THE REVIEW OF AUSTRIAN ECONOMICS

Articles

Larry J. Eshelman
Ludwig von Mises on Principle

Bruce L. Benson
The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest

Donald J. Boudreaux and Thomas J. DiLorenzo
The Protectionist Roots of Antitrust

Review Essays

David Gordon
Toward a Deconstruction of Utility and Welfare Economics

Joseph T. Salerno
Mises and Hayek Dehomogenized

Book Reviews

Tibor Machan, *Capitalism and Individualism*

Henry B. Veatch, *Swimming Against the Tide in Contemporary Philosophy*

VOLUME 6, NUMBER 2 1993

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE REVIEW OF AUSTRIAN ECONOMICS

Volume 6, Number 2

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Review of Austrian Economics

Murray N. Rothbard, Editor
University of Nevada, Las Vegas

Walter Block, Co-Editor
College of the Holy Cross

Steve H. Hanke, Associate Editor
The Johns Hopkins University

Judith F. Thommesen
Managing Editor

Editorial Board

Martin Anderson
Hoover Institution
Stanford University
Dominick T. Armentano
University of Hartford
Roger Arnold
California State
University, San Marcos
Charles W. Baird
California State
University, Hayward
Don Bellante
University of South
Florida
James T. Bennett
George Mason
University
Olufur Bjørnsson
University of Iceland
Samuel Bostaph
University of Dallas
J. B. Bracewell-Milnes
Surrey, England
Yale Brozen
University of Chicago
Alfred G. Cuzan
University of West
Florida
Thomas J. DiLorenzo
Loyola College
Richard M. Ebeling
Hillsdale College
Robert B. Ekelund, Jr.
Auburn University
Joseph Fuhrig
Golden Gate
University
Lowell Gallaway
Ohio University
Fred R. Glahe
University of Colorado
David Gordon
Ludwig von Mises
Institute
Henry Hazlitt
Fairfield, Connecticut
Robert F. Hébert
Auburn University
Robert Higgs
Seattle University
Ole-Jacob Hoff
Tjøme, Norway
Randall G. Holcombe
Florida State University
Hans-Hermann Hoppe
University of Nevada
Las Vegas
Edward Kaplan
Western Washington
University
Lord Harris of High Cross
Institute of Economic
Affairs, London, England
Kurt Leube
Hoover Institution
Stanford University
Stephen O. Littlechild
University of Birmingham
England
Naomi Moldofsky
University of Melbourne
Australia
Thomas Gale Moore
Hoover Institution
Stanford University
John C. Moorhouse
Wake Forest University
David O'Mahony
University College
Cork, Ireland
David Osterfeld
St. Joseph's College
E. C. Pasour, Jr.
North Carolina State
University
William H. Peterson
Washington, D.C.
W. Duncan Reekie
University of the
Witwatersrand
South Africa
Morgan O. Reynolds
Texas A & M University
Charles K. Rowley
George Mason University
Joseph T. Salerno
Pace University
Arthur Seldon
Institute of Economic
Affairs, London, England
Sudha Shenoy
University of Newcastle
Australia
Mark Skousen
Rollins College
Gene Smiley
Marquette University
John W. Sommer
Urban Institute
University of North
Carolina, Charlotte
T. Alexander Smith
University of Tennessee
Thomas C. Taylor
Wake Forest University
Richard K. Vedder
Ohio University
Leland B. Yeager
Auburn University
Albert H. Zlabinger
Carl Menger Institute
Vienna, Austria

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE REVIEW OF AUSTRIAN ECONOMICS

Volume 6, Number 2

Edited by
Murray N. Rothbard
University of Nevada, Las Vegas

Co-edited by
Walter Block
College of the Holy Cross

LUDWIG VON MISES INSTITUTE

Auburn University

Kluwer Academic Publishers
Boston/Dordrecht/London

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Review of Austrian Economics

SUBSCRIPTION RATES

The subscription price for 1992, Volume 6 (2 issues) is:
For institutions Dfl. 213.00/US $108.50 including postage and handling.

ORDERING INFORMATION / SAMPLE COPIES

Subscription orders and requests for sample copies should be sent to:

Kluwer Academic Publishers Group
P.O. Box 322
3300 AH Dordrecht
The Netherlands

or

Kluwer Academic Publishers
101 Philip Drive
Assinippi Park
Norwell, MA 02061, USA

or to any subscription agent

All requests for further information concerning *The Review of Austrian Economics* should be sent to:

Kluwer Academic Publishers
101 Philip Drive
Assinippi Park
Norwell, MA 02061, USA

or

Kluwer Academic Publishers
P.O. Box 163
3300 AD Dordrecht
The Netherlands

Photocopying. *In the U.S.A.:* This journal is registered at the Copyright Clearance Center, Inc., 27 Congress Street, Salem, MA 01970. Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by Kluwer Academic Publishers for users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that the base fee of $5.00 per copy per article is paid directly to CCC. For those organizations that have been granted a photocopying license by CCC, a separate system of payment has been arranged. The fee code for users of the Transactional Reporting Service is 0889-3047/92/$5.00.

Authorization does not extend to other kinds of copying, such as that for general distribution, for advertising or promotional purposes, for creating new collective works, or for resale.

In the rest of the world: Permission to photocopy must be obtained from the copyright owner.

Copyright © 1993 by The Ludwig von Mises Institute.

ISSN 0889–3047

Printed on acid-free paper.

The Review of Austrian Economics has two broadly conceived objectives: (1) to promote the development and extension of Austrian economics and (2) to promote the analysis of contemporary issues in the mainstream of economics from an Austrian perspective.

Correspondence relating to submissions, articles, book reviews, permission to quote, and back issues through volume 3 should be addressed to: *Review of Austrian Economics,* Ludwig von Mises Institute, Auburn University, Auburn, Alabama 36849.

Papers submitted for consideration should be double-spaced, include three copies of the manuscript, and an abstract of not more than 250 words to assist the referees. There is no submission fee. Articles that are accepted will be requested on an IBM format diskette, when possible.

The opinions expressed in this volume by the authors in their respective articles are their own and *The Review of Austrian Economics* assumes no responsibility for these views.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Dedication

Volume 6, number 2, of the *Review of Austrian Economics* is dedicated to the Members of the Ludwig von Mises Institute, whose generosity makes such projects possible, and in particular to O. P. Alford, III, Thomas K. Armstrong and the Armstrong Foundation, Everett Berg and EBCO Enterprises, Eugene W. Bluemly, Jr., Franklin M. Buchta, Samuel O. Campbell, Christopher P. Condon, Guy Curtis and the Alta Hier Estate, Robert T. Dofflemyer, Michael L. Keiser, Robert D. Kephart, Hugh E. Ledbetter, Peter K. Martin, Ellice McDonald, Jr., James M. Rodney, Sheldon Rose, Leland W. Schubert and the AHS Foundation, Mrs. Somers von Behren, Frederick G. Wacker, Jr., and Dallas R. Wolf.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Review of Austrian Economics would like to thank the following referees for their help:

Charles W. Baird

Donald J. Boudreaux

David Gordon

Robert F. Hébert

Robert Higgs

Randall G. Holcombe

Joseph T. Salerno

Richard K. Vedder

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE REVIEW OF AUSTRIAN ECONOMICS

Articles

Larry J. Eshelman
Ludwig von Mises on Principle 3

Bruce L. Benson
The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest 43

Donald J. Boudreaux and Thomas J. DiLorenzo
The Protectionist Roots of Antitrust 81

Review Essays

David Gordon
Toward a Deconstruction of Utility and Welfare Economics 99

Joseph T. Salerno
Mises and Hayek Dehomogenized 113

Book Reviews

Tibor Machan, *Capitalism and Individualism*
Reviewed by David Gordon 149

Henry B. Veatch, *Swimming Against the Tide in Contemporary Philosophy*
Reviewed by David Gordon 153

VOLUME 6, NUMBER 2 **1993**

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Articles

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Ludwig von Mises on Principle

Larry J. Eshelman*

Ludwig von Mises was one of this century's most principled and uncompromising defenders of laissez faire. He was also an outspoken advocate of utilitarianism and the doctrine of social expediency, and a critic of any kind of objective ethics such as natural law or natural rights. This raises the obvious question as to how successful Mises was in turning the sow's ear of social expediency into the silk purse of laissez faire.

Murray N. Rothbard's answer is that Mises was not successful—that no one, not even Mises, could accomplish such a feat (1982, pp. 205–13). Henry Hazlitt (1964) and Leland Yeager (1992), on the other hand, have argued that utilitarianism really is not the sow's ear that its critics have made it out to be—or at least not the brand of utilitarianism that they attribute to Mises: indirect utilitarianism. Furthermore, they argue that only utilitarianism, properly understood, can provide a moral foundation for laissez faire.

While I agree with Rothbard that utilitarianism, whether direct or indirect, cannot provide a principled defense of laissez faire, I shall argue that Mises's method of justifying laissez faire has more in common with the natural rights approach of Herbert Spencer and Auberon Herbert than the utilitarianism of Bentham and Mill. It should be stressed that I am not disputing the easily documented fact that Mises proclaimed himself to be a utilitarian, and was highly critical, even scornful of natural law and natural rights doctrines (Rothbard 1980). One can dredge up quote after quote where Mises defends utilitarianism and social expediency and attacks natural law and natural rights theories. On the other hand, one cannot ignore Mises's "apparent use of natural law–type constructs, in spite of his explicit rejection of natural law" (Tucker and Rockwell 1991, p. 48).

*Larry J. Eshelman is an independent scholar living in New York.

The Review of Austrian Economics Vol.6, No. 2 (1993): 3–41
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In trying to understand Mises's relationship to the natural law tradition, one should keep in mind, as Mises pointed out, that the natural law tradition is made up of a "bewildering diversity of doctrines" (1957, p. 45). The same can be said of utilitarianism. Defenders, as well as critics, of these traditions rarely agree as to what constitutes their defining criteria. For example, if one believes that the essence of the natural law tradition is the fusion of the "ought" and the "is," or the doctrine that Nature has a purpose and morality consists in following Nature's intentions, then clearly Mises stands opposed to that tradition. There are, however, other important features of the natural rights tradition, especially with regard to methodology, that generally distinguish it from the utilitarian tradition.

In the next three sections I distinguish three different senses in which one may be properly labeled a utilitarian: (1) a nonmoral *functionalist* sense concerned with whether means are efficient; (2) a moral sense concerned with *social harmony*; and (3) a methodological sense in which alternative institutions and actions are *compared* with regard to how well they promote utility. It is my contention that Mises was a utilitarian in only the first two senses, and that his criticism of the natural rights tradition is aimed mainly at what he conceived to be its irrational, nonfunctional aspects—i.e., its appeal to intuition. In the remaining sections I argue that Mises's methodological approach to morality is more akin to the principled (or *categorical*) stance taken by defenders of the natural rights tradition rather than the *comparative* stance taken by utilitarians such as Bentham and Mill.[1]

Functionalism versus Intuitionism

It is important to begin by clarifying what Mises means by utilitarianism, and this can best be done by understanding what he was contrasting utilitarianism with. For Mises the alternative to utilitarianism is an appeal to "intuition" (1922, p. 360; 1966, p. 883; 1957, pp. 53, 58), to an "inner voice" (1933, p. 41; 1957, p. 53), to

[1]I am not claiming that these three senses of utilitarianism are explicit in Mises's writings, but only that they help resolve the apparent conflict between Mises's principled stance toward liberty and his professed belief in social expediency. My approach to Mises's utilitarianism is similar to that taken by Hans-Hermann Hoppe with regard to Rothbard's natural rights: "my approach . . . seems to be more in line with what Rothbard actually does when it comes to justifying the specific norms of libertarianism than the rather vague methodological prescriptions of the natural rights theorists" (Hoppe 1988, p. 61). I hope to show that in spite of his professed utilitarianism, Mises takes a principled approach to ethics that has much in common with the approach taken by Rothbard and Hoppe.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"considerations hidden to the human mind" (1966, p. 148), to "arbitrary laws imposed upon man by a tyrannical Deity with which man has to comply without asking any further questions" (1962, p. 105). For the intuitionist moral laws are viewed as "instruments by means of which God or Nature directs human action according to inscrutable design" (1945, p. 223). Mises places natural law and natural rights in the intuitionist camp, and therefore rejects them as irrational and arbitrary.

Although I think that this turns the natural law tradition into a straw man, it must be admitted that there have been strong intuitionist elements within the natural law and natural rights tradition. For example, Aquinas postulated the special faculty of synderesis as the source of our knowledge of principles of natural law, and Locke's principal argument for natural rights seems to hinge on the premise that God is our Maker (1988, p. 271). What makes Bentham's utilitarianism appealing to many rationalists, including Mises, is that Bentham swept away the remaining intuitionist vestiges of natural law. Unfortunately, Bentham threw out more than the murky bath waters of intuitionism.

To avoid stacking the deck against the natural law and natural rights traditions by identifying utilitarianism with reason and natural law with intuition, I suggest that we re-label this contrast as "functionalism" versus "intuitionism." As Hayek pointed out, if we refer to "any critical examination of such rules and of institutions with respect to the function they perform in the structure of society" as utilitarianism, then "every one who does not regard all existing values as unquestionable but is prepared to ask why they should be held would have to be described as a utilitarian. Thus Aristotle, Thomas Aquinas, and David Hume, would have to be described as utilitarians" (1976, p. 17). What Aristotle, Aquinas, Hume, Bentham, Mill, and Mises have in common is not some appeal to "the greatest happiness for the greatest number," but a belief that morality serves some earthly social function and can be understood by reason, as opposed to something "imposed on mankind by mysterious powers" (1933, p. 42).

Although the term "utilitarianism" has become identified with Bentham's doctrine of "the greatest happiness for the greatest number," i.e., with the maximization of utility or social welfare, one must keep in mind that when Mises advocates utilitarianism he is often simply advocating that we ask what the purpose of a policy, institution, etc. is and judge it by how well it achieves this purpose. As such, functionalism is not a moral doctrine, although it can be applied to morality. In the next section I will examine functionalism as it relates

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to morality, but here I am concerned with generic, nonmoral functionalism.

The functionalist judges acts (or policies) in terms of how adequate (or efficient) they are as means for accomplishing a given end. In other words, all "oughts" are hypothetical or conditional and are of the form: "If you want to accomplish *E*, then you ought to do *M*." The end or goal is not judged. Only the means are judged as to whether or not they are appropriate to the given end. Even if one considers the goal evil, one can still judge certain means as more appropriate for accomplishing that goal, and thus good, relative to the goal. Thus Mises, as a functionalist, says, "if there were people who consider it as the ultimate end of their endeavors to destroy civilization . . . , then we could not help applying to their doctrines the standard of their ultimate end" (1949b, p. 300). (There remains the question as to whether it would be ethical to give helpful advice to someone who is intent upon destroying civilization.)

This is the brand of utilitarianism with which Mises, like most economists, feels most comfortable. He can make judgments without abandoning the value-free stance of the economist. Mises speaks (1966, p. 764) as a nonmoral functionalist when he asserts, "Economics does not say that . . . government interference with the prices of only one commodity . . . is unfair, bad, or unfeasible. It says . . . that it makes conditions worse, not better, *from the point of view of the government and those backing its interference*." Rothbard (1982, p. 206) quotes this passage and asks, "[H]ow does Mises know *what* the advocates of the particular policy consider desirable?" But I do not think this criticism hits the mark. Mises's point is simply that such policies will not accomplish their proclaimed goals. Those who advocate a minimum wage, for example, may really want to make nonunion labor uncompetitive, but their *proclaimed* goal is that they want to help the poor. By showing that certain policies will have the opposite effect from that proclaimed, the functionalist can undermine the arguments used in support of these policies.

If people's goals were so diverse that hardly any two people shared the same goals, the functionalist would not have much to contribute. But Mises contends that most people share certain goals. In particular, he asserts that most "people prefer life to death, health to sickness, nourishment to starvation, abundance to poverty" (1966, p. 154). In so far as the socialist or interventionist argues that his policy will make people more prosperous, he is subject to criticism from the functionalist standpoint (1927, pp. 7–8; 1966, p. 183). It should be stressed that Mises is not giving any *moral* relevance to the fact that the majority prefers prosperity to poverty. For the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

generic functionalist such facts concerning majority preferences have only practical relevance—i.e., arguments concerning appropriate means will be relevant to more people than if only a minority shared this goal.

In order for nonmoral functionalism to be an appropriate mode of argument, however, it is not enough that everyone agree upon the end in question. While it may be true that most people value prosperity and abundance, it is not true that these are their only goals (Rothbard 1982, p. 209). Almost any policy purporting to achieve a particular end will affect other ends as well. The functionalist cannot ignore these other ends. Suppose, for example, most people are willing to trade off some prosperity for increased economic equality. The functionalist's argument that certain alternative policies lead to greater prosperity is no longer relevant if these policies cause greater inequality. In fact, Mises recognizes this weakness in the functionalist argument. He suggests that the socialist might reply to the argument that there is greater prosperity under capitalism as follows: "Granted that each individual will be worse off under socialism than even the poorest under capitalism. Yet we spurn the market economy in spite of the fact that it supplies everybody with more goods than socialism. We disapprove of capitalism on ethical grounds as an unfair and amoral system. We prefer socialism on grounds commonly called noneconomic and put up with the fact that it impairs everybody's material well-being" (1966, p. 679). Mises's comment is, "If no other objections could be raised to the socialist plans than that socialism will lower the standard of living of all or at least of the immense majority, it would be impossible for praxeology to pronounce a final judgment" (1966, p. 679).[2]

Another problem with nonmoral functionalism is that it is not very useful for making a case against forms of statist intervention that have little effect upon prosperity, e.g., oppression of the majority against a small minority (Rothbard 1982, p. 211). In order to attack these forms of statist intervention, the laissez-faire liberal needs a stronger argument than nonmoral functionalism—he needs some kind of moral argument. As we will see in the next section, Mises indeed does resort to a form of moral functionalism when defending laissez-faire liberalism. I will argue in the subsequent sections, however, that his moral functionalism is not the moral utilitarianism of Bentham and Mill.

[2]Mises believes, however, that a "final judgment" can be made, because economic calculation is not possible under socialism, and so socialism is not a realizable system.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Social Harmony

The functionalist approaches morality by first determining the function or end of morality, and then assessing various moral rules according to how well they serve this function. For Mises, as for most moral functionalists, the function of morality is the preservation of the social order: "Everything that serves to preserve the social order is moral; everything that is detrimental to it is immoral" (1927, p. 34). "The ultimate yardstick of justice is conduciveness to the preservation of social cooperation. Conduct suited to preserve social cooperation is just, conduct detrimental to the preservation of society is unjust" (1957, p. 54). If man were not a social being, he would not need morality. "Morality consists in the regard for the necessary requirements of social existence that must be demanded of each individual member of society. A man living in isolation has no moral rules to follow" (1927, p. 33). Throughout Mises's writings the stress is on the "preservation of society" (1966, p. 149), the "preservation of peace" (1966, p. 149), and the "preservation of social cooperation" (1962, p. 105). For Mises, "Human society is an association of persons for cooperative action" (1927, p. 18), and cooperation presupposes peace. "Society has arisen out of the works of peace; the essence of society is peacemaking" (1922, p. 59). "The goal of liberalism is the peaceful cooperation of all men" (1944, p. 50).[3]

To avoid the ambiguities associated with "utilitarianism" as a moral theory and to avoid begging the question against "natural rights," I suggest we call anyone who views the primary aim of justice to be the "securing a peaceful living together" a *social harmonist*.[4] A moral rationalist, in the sense of a social harmonist, is someone who believes that a society of morally rational individuals would exist in a state of social harmony. In other words, it would be a peaceful society with no need for coercion. Societies only have to resort to coercion because not everyone is rational in this social sense. Mises explicitly states that social harmony is the ideal and is possible: "The ultimate ideal envisioned by liberalism is the perfect cooperation of all mankind, taking place peacefully and without friction" (1927, p. 105). "If all men were able to realize that the alternative to peaceful social cooperation is the renunciation of all that distinguishes Homo sapiens from the beasts of prey, and if all had the moral strength always to act accordingly,

[3]This paragraph and many similar observations throughout this essay concerning Mises's social theory owe much to Joseph Salerno's essay, "Ludwig von Mises as Social Rationalist" (1990).

[4]I am borrowing the label "harmonist" from Mises, although giving it a somewhat wider connotation (1957, p. 40).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

there would not be the need for the establishment of a social apparatus of coercion and oppression" (1962, p. 98).

Mises's stress upon preserving social peace certainly fits in with the utilitarian tradition of J. S. Mill. When discussing justice, Mill stresses social peace: "It is their observance [of the rules of justice] which alone preserves peace among human beings; if obedience to them were not the rule, and disobedience the exception, everyone would see in everyone else an enemy against whom he must be perpetually guarding himself" (Mill 1971, p. 54).

It should be pointed out, however, that this stress upon social harmony, although part of the utilitarian tradition, is not unique to that tradition. Herbert Spencer, for example, describes his theory of justice as an "attempt to find a definite expression for the fundamental principle of harmonious social order" (Spencer 1978, p. 66). Given that some utilitarians have claimed Spencer as a fellow-traveler, it should be noted that Lysander Spooner, who has never been mistaken for a utilitarian, states that the natural law is "the science of peace; and the only science of peace; since it is the science which alone can tell us on what conditions mankind can live in peace, or ought to live in peace, with each other" (Spooner 1982, p. 5). Along these same lines, Locke wrote that the law of nature "willeth the Peace and *Preservation of all Mankind*" (Locke 1988, p. 271).

More generally, according to A. P. D'Entrèves, one the foremost scholars of natural law, the primary focus of much of the natural law tradition has been on the preservation of society:

> No doubt natural law, as a moral precept, extends to "all acts of virtue." But human laws cover only those aspects of human behavior which imply a coordination with other men. Thus, properly speaking, the laws of men do not primarily aim at virtue, but only at securing a peaceful living together: they do not forbid all that is evil, but only that which imperils society. (D'Entrèves 1970, p. 84)

Thus, we must include as social harmonists not only utilitarians such as Bentham and Mill but also modern natural rights theorists such as Locke and Spencer and most ancient and medieval natural law theorists. If there are any natural law theorists who really advocate the principle, "let justice be done, though the world perish," as opposed to, "let justice be done, lest the world perish," then they are not social harmonists.

But if the debate between natural law theorists and utilitarians is not over utility as defined in terms of social harmony, then what is it about? I suggest that the basic difference is one of methodology.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

This difference has been succinctly summarized by another modern defender of natural law, Paul Sigmund, as follows:

> For natural law theorists . . . utility is a result of the observance of natural law principles, whereas for utilitarians the principles of justice are an indication or codification of long-run utility. Both take account of the same moral experience and both often come to the same conclusions, but one emphasizes the *a priori* and universal character of our moral conclusions about man in society, and the other emphasizes the basis for these conclusions in human desires and in a posteriori effects which follow their adoption. (1971, p. 152)

Among classical defenders of natural rights, Herbert Spencer most clearly articulated this methodological distinction in order to distinguish his moral theory from the utilitarianism of Bentham and Mill. Spencer did not reject the label "utilitarianism," since he too saw happiness as the "ultimate end" (1989, p. 109) or "creative purpose" (1970, p. 61). What he objected to was making happiness "the rule of human conduct" (1970, p. 60) since the idea of the greatest happiness was "capricious" (1970, p. 27). Instead of trying to estimate the empirical consequences of an action or a policy, morality should be concerned with ascertaining "the *conditions* by conforming to which this greatest happiness may be attained" (1970, p. 61). Spencer did not object to being called a utilitarian, provided this label was qualified with the word "rational" to distinguish his doctrine from the "empirical utilitarianism" of Bentham and Mill (Spencer 1978, p. 494).[5]

Utilitarians have tended to either dismiss or misinterpret Spencer's point about method (in so far as they have paid any attention to Spencer at all). J. S. Mill is typical in this respect. Mill, in reply to Spencer's criticism of utilitarianism, asserted that there was no essential disagreement between Spencer and himself (and Bentham), dismissing Spencer's stress upon necessary consequences as not very important (Mill 1971, p. 56). Others have taken Spencer's methodological point more seriously but have interpreted it as being the distinction between direct (act) utilitarianism and indirect utilitarianism. According to John Gray,

> Indirect utilitarianism may be defined as that species of utilitarian theory in which a strong distinction is marked between the critical and practical levels of moral thought, and in which the principle of

[5]Locke, who wrote before utilitarianism had been developed as a distinct theory, made a similar methodological distinction: "Utility is not the basis of the law or the ground of obligation, but the consequence of obedience to it" (Sigmund 1971, p. 93).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> utility is evoked, solely or primarily, at the critical level. Utilitarian appraisals apply, not to conduct, but to the considerations which govern conduct—not only social rules, but the whole body of sentiments, attitudes and dispositions which lead us to one thing rather than another. (Gray 1989, p. 122)

Gray classifies both J. S. Mill and Spencer as indirect utilitarians.

Although it is true that Spencer believed that direct utilitarianism would lead to social "confusion" (1970, p. 16), his objection was much deeper than this. What Spencer mainly objected to in the utilitarian philosophy was its lack of principle, i.e., its stress on expediency. Now this may seem to be consistent with Gray's point about indirect utilitarianism: "Indirect utilitarianism is distinct from a sophisticated act-utilitarianism view, then, because it requires that certain practices and conventions be accorded enough weight for their claims to be able to *resist erosion* by utilitarian appraisals" (Gray 1989, p. 130, italics added). Spencer thought, however, that if anything, it was "incomparably less difficult" to "trace out the consequences a given act will entail" than to do so for "some public measure," but that in neither case could one make "trustworthy inferences" (1970, p. 73). Ironically, in one of the key texts that is supposed to provide evidence that Mill was an indirect, and therefore, a principled utilitarian Mill states, "All persons are deemed to have a *right* to equality of treatment, except when some recognized social expediency requires the reverse" (Mill 1971, p. 56). A little later he says, "Thus to save a life, it may not only be allowable, but a duty to steal or take by force the necessary food or medicine, or to kidnap and compel to officiate the only qualified medical practitioner" (Mill 1971, p. 57). (Perhaps this is a utilitarian's ideal of resisting "erosion," but to nonutilitarians it looks more like a mud slide.)

Of course Mill's failure to take a principled stance should not be used to convict all indirect utilitarians. I argue in the next section, however, that what I call the comparative–categorical contrast better captures the distinction Spencer was trying to make than the direct-indirect contrast. The direct–indirect distinction is a question of what one should compare. The direct utilitarian compares acts, choosing those whose consequences provide more utility. The indirect utilitarian compares rules, institutions, policies, sentiments, choosing those whose consequences provide more utility. In both cases, a *comparative* approach is taken. The distinction between direct and indirect utilitarianism is based on a distinction between what is being compared. Spencer, on the other hand, rejects the comparative approach, taking instead a *categorical* approach to social harmony.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Comparative versus Categorical Harmonists

The comparative harmonist compares the alternatives, whether they be acts, rules, institutions, etc. and picks the best from among these alternatives. Comparative harmonists differ as to how to choose among alternatives. Some argue that happiness should be maximized, others that pain and suffering should be minimized. Others argue for maximizing liberty instead of happiness. Still others, like Hayek, argue for maximizing expectations or "chances of anyone selected at random" (Hayek 1976, pp. 129–30). Some, like Bentham, presuppose that happiness can be quantified and summed, whereas others resort to devices such as taking the stance of an impartial spectator or making decisions behind a veil of ignorance. But in all cases these doctrines assume a moral framework in which the moral theorist chooses the best from among the alternatives. Thus the comparative harmonist can be described as a maximizer, although it should be stressed that this means choosing the best among known alternatives, not the best among all possible alternatives.

The categorical harmonist, on the other hand, believes there are only two moral alternatives: social harmony or social chaos, the way of reason or the way of the beasts.[6] As Cicero put it, "There are two types of conflict: one proceeds by debate, the other by force. Since the former is the proper concern of man, but the latter of beasts, one should only resort to the latter if one may not employ the former" (Cicero 1991, p. 14). The categorical harmonist views those who are not rational, i.e., who seriously imperil social harmony, as enemies of the social order and thus subject to coercion. Whereas for the comparative harmonist the primary moral relationship is maximization, for the categorical harmonist it is reciprocity—social harmony is possible only among those who are committed to social harmony.

The categorical harmonist separates people into two general classes—those within the law and those outside. Those who by their actions demonstrate that they either have contempt for the social order or are incapable of acting in accordance with social harmony are declared outlaws and treated accordingly. Thus Locke writes, "In transgressing the law of nature, the offender declares himself to live by another rule than that of *reason* and common equity" (1988, p. 272). Furthermore, by putting oneself outside the reach of reason, one forfeits one's right to be treated as a reasonable being: "[O]ne may destroy a man who makes war upon him, or has

[6]Or to use Murray Rothbard's apt phrase, the categorical harmonist adopts a "polar analysis" (1970, p. 264).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

discovered an enmity to his being, for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the common law of reason, have no other rule, but that of force and violence" (1988, p. 279).[7]

The comparative harmonist, on the other hand, does not automatically declare those who disregard the conditions for social harmony to be outlaws. His moral world is not so black-and-white, and for this reason gives the illusion of being more humane and tolerant. Since the underlying principle of morality for the comparative harmonist is to maximize utility (or happiness or social welfare), the fact that an individual is behaving irrationally—acting in ways that are harmful to the social welfare—does not exclude this individual from being included in the utility calculus.

This basic difference in moral outlook is reflected in how the categorical and comparative harmonist justify punishment. For both the categorical and the comparative harmonist, there is a presumption against the use of physical force. This is what distinguishes social harmonists from social nihilists—those who believe that might is right. Categorical and comparative harmonists differ, however, concerning what overrides this presumption against the use of force. For the categorical harmonist, force is justified only against someone who shows a disregard for social harmony. (The nihilist, by declaring through his actions that he believes that might is right, can hardly complain when we use force against him.) For the comparative

[7]In another passage Locke states, "a criminal, who having renounced reason, the common rule and measure, God hath given to mankind, hath by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a *lion* or a *tiger*, one of those wild savage beasts, with whom men can have no society nor security: And upon this is grounded the great law of nature, *who so sheddeth mans blood, by man shall his blood be shed*" (1988, p. 274). Auberon Herbert takes a similar stance: "My justification [in knocking a thief down] was, that he had established between himself and the rest of society the force relation, and therefore I had to deal with him as I should have dealt with a wild beast that had attacked me" (Herbert 1978, p. 101). "The men who do so restrain their neighbor, . . . are men who disallow this universal law [against aggression], and therefore lose the rights which they themselves possess under it" (p. 141). This same reciprocity based moral framework is presupposed by Rothbard's discussion (in the context of animal rights) of what he calls the "Martian problem": "If we should ever discover and make contact with beings from other planets, could *they* be said to have the rights of human beings? It would depend on their nature. If our hypothetical 'Martians' were like human beings—conscious, rational, able to communicate with us and participate in the division of labor, then presumably they too would possess the rights now confined to 'earth-bound' humans. But suppose, on the other hand, that the Martians also had the characteristics, the nature, of the legendary vampire, and could only exist by feeding on human blood. In that case, regardless of their intelligence, the Martians would be our deadly enemy and we would not consider that they were entitled to the rights of humanity" (Rothbard 1982, p. 156).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

harmonist, on the other hand, force is justified only by showing that the consequences outweigh the intrinsically negative utility of the use of force. Thus, for a categorical harmonist punishment is viewed primarily as restitutional and retributive, whereas for a comparative harmonist punishment is viewed primarily as a deterrent and for reforming the criminal. The former is backward looking and proper to a nomocratic social theory where justice is measured against one's relationship to law and the need to preserve social harmony. The latter is forward looking and proper to a teleocratic social theory where justice is measured against a goal—the maximization of utility.

In a society based on a categorical moral framework, if someone disturbs the order of society, he is expected to restore the order—to make restitution. If he refuses to be bound by that order, he, in effect, declares himself an enemy of that order and becomes an outlaw and is no longer protected by the law (or more precisely, not protected by the law to the extent of, and in proportion to, his disregard for social harmony). In a society based on a comparative moral framework, on the other hand, punishment is justified only if it positively contributes to the overriding purpose of maximizing utility. The murderer's happiness counts just as much as everyone else's, including his potential victims. (This is a logical consequence of the principle that "equal amounts of happiness are equally desirable, whether felt by the same or different persons" [Mill 1971, p. 56].) The reason the murderer can be justifiably restrained and punished is that the resulting pain and suffering caused to the murderer (and, indirectly, to his mother, friends, etc.) is outweighed by the pain prevented to the rest of society. Punishment is justified only if the pain inflicted by punishment is outweighed by the expected social benefits. Likewise, punishing someone who has not done anything that threatens the peace of society is justified if the pain inflicted is outweighed by the social benefit. Admittedly, comparative harmonists can come up with plausible rationales why punishing the innocent would rarely maximize utility. The point is, however, that, unlike the categorical harmonist, the comparative harmonist has to do this in a roundabout and rather tenuous manner, making some rather strong assumptions about future consequences and the interpersonal comparison of utilities.

Both the similarities and the differences between the comparative and categorical harmonists are illustrated by how their defenders attempt to justify these two moral frameworks. Both begin with the individual's desire for happiness, but even here there is a subtle difference in emphasis. Whereas the comparative harmonist stresses the individual's desire to maximize his own happiness, the categorical

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

harmonist tends to stress the universal law of self-preservation. Many categorical harmonists go so far as to argue that each individual has a duty to preserve himself. Locke, for example, attempted to ground this obligation by arguing that men are the "workmanship of one omnipotent, and infinitely wise maker" (1988, p. 271), and so are ultimately the property of God. Others, such as Aristotelian rights theorists, have argued that the duty of self-preservation follows from man's inherent nature. But the categorical harmonist is not necessarily committed to justifying a duty to preserve oneself—i.e., he need not be committed to the strong assumption that a person who fails to defend himself is irrational and violates his nature or God's trust, and so should be condemned. What distinguishes the categorical harmonist is that he starts with the fact that it is reasonable to expect most people to try to preserve themselves (whether they have a duty to or not), and, in particular, to defend themselves from attack.

It is in the next step of the argument, the move from the individual's desire for happiness to the derivation of the basic principle of morality, that the comparative and categorical harmonists most radically differ. The comparative harmonist's argument is always some version of Mill's notorious inference from the fact that each individual desires his own happiness to the desirability of the general happiness (1971, p. 37). The categorical harmonist, on the other hand, asks: Given the nearly universal law that people will defend themselves when attacked, under what conditions is social harmony possible? The prototypical answer is given by Spencer. After noting that the desire for self-preservation applies to all creatures, and thus lacks an ethical quality, he takes the next step:

> Ethical character arises only with the distinction between what the individual *may* do in carrying on his life-sustaining activities, and what he *may not* do. This distinction obviously results from the presence of his fellows. Among those who are in close proximity, or even some distance apart, the doing of each are apt to interfere with the doings of others; and in the absence of proof that some may do what they will without limit, while others may not, mutual limitation is necessitated. The non-ethical form of the right to pursue ends, passes into the ethical form, when there is recognized the difference between acts which can be performed without transgressing the limits, and others which cannot be so performed. (Spencer 1981, p. 150)

Auberon Herbert makes a similar move. Beginning with the premise that "Underneath all life lies the great law of self-preservation," he

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

notes that this is "a law which we may fulfill either by using force as the animals do, or by universally accepting the reasonable relation which, forbidding force, guarantees equal freedom to all" (Herbert 1978, p. 101).

In brief, although the comparative harmonist shares with the categorical harmonist the goal of preserving society, this is seen only as a first step, albeit a necessary one, toward a more ambitious goal. The comparative harmonist judges the institutions of a society as inadequate, no matter how peaceful that society may appear on the surface, if these institutions can be modified so as to increase the total social welfare. Of course, one must weigh the costs of making any modification against future gains, and in practice a comparative harmonist may be very conservative in weighing these costs, as Bentham was, but in principle any institution is always subject to revision since someone may come up with a new alternative that is even better than any of the previous alternatives that have been considered in the past. In essence the comparative harmonist is always a social tinkerer.

Mises and Maximization

We can now address the question of whether Mises was a utilitarian in the maximizing, comparative sense or whether he was a categorical harmonist. In this section I argue that the evidence clearly indicates that he was not a maximizer, and in the next section I take up the question of whether he can more properly be classified as a categorical harmonist.

Now it may seem that when Mises says that laissez-faire liberalism promises "the most abundant possible satisfaction of all those desires that can be satisfied by the things of the outer world" (1927, p. 4), he does not leave much doubt that he is a moral utilitarian of the maximizing variety. But as was pointed out in the first section, when the issue is an agreed-upon policy goal, e.g., prosperity, then Mises can as a value-free economist recommend certain liberal policies as the best means for accomplishing this goal. In any case, one should not read too much into such statements. After all, natural rights liberals also believe that laissez faire will lead to a better world. More relevant are statements such as "the only yardstick that must be applied to [law and legality, the moral code and social institutions] is that of expediency with regard to human welfare" (1966, p. 147). Here Mises leaves no doubt that he is advocating a moral doctrine, not functionalism in general, and this moral doctrine seems to imply the maximization of social welfare. But compare this passage to a very similar passage: "The ultimate yardstick of justice

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is conduciveness to the preservation of social cooperation. Conduct suited to preserve social cooperation is just, conduct detrimental to the preservation of society is unjust" (1957, p. 54). No categorical harmonist would have problems with this passage. Furthermore, in the former passage the very next sentence reads, "The utilitarian economist does not say: *Fiat justia, pereat mundus*. He says: *Fiat justia, ne pereat mundus*." This is one of Mises's favorite points: the utilitarian rejects "Let justice be done, though the world perish" for "Let justice be done, lest the world perish." The contrast is between destroying and preserving the social order, not between maximizing and failing to maximize utility. Or consider the following passage, "The policy of liberalism is the policy of the common good, the policy of subjecting particular interests to the public welfare" (1922, p. 456). Taken out of context, this is the kind of statement that one would typically attribute to a social harmonist concerned with maximizing utility. Mises immediately adds, however, that this is "a process that demands from the individual not so much a renunciation of his own interests as a perception of the harmony of all individual interests" (1922, p. 456). What Mises clearly means is that in order for social harmony to be possible, individuals cannot completely ignore other individuals. This is fully consistent with the categorical harmonist's argument for rights.[8]

It becomes even more difficult to attribute a maximizing interpretation to these passages in the light of other statements made by Mises that seem to explicitly reject a maximizing view of utilitarianism. These statements can be divided into two categories that parallel the two major objections that critics have raised against utilitarianism: (1) Utilitarianism demands that individuals be willing to sacrifice themselves to the greater good, but why should any individual agree to do this? (2) Utilitarianism presupposes that interpersonal comparisons of utility can be made; yet, this presupposition is highly dubious, if not incoherent.[9]

Mises employs both these objections against moral doctrines that he rejects. With regard to the first objection, Mises's major criticism of "anti-utilitarian" doctrines, in addition to his rejection of their

[8]Compare Herbert: "Man is predestined to find his complete happiness, as Mr. Spencer teaches, only when the happiness of others becomes to him an integral part of his own; but this development of his nature cannot take place unless he is living under those true conditions which belong to a free life" (Herbert 1978, pp. 116–17).

[9]See, for example, Narveson (1988, pp. 150–153). In addition to these two fundamental objections, critics have also argued that utilitarianism has certain counter-intuitive implications—e.g., the punishment of the innocent under certain circumstances.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

appeal to intuition, is that they require self-sacrifice. According to Mises, one of the contributions of "utilitarianism" is that the "dualism of motivation assumed by most ethical theorists" was overthrown (1922, p. 357). "Utilitarian philosophy . . . reduced these apparent antagonisms [selfishness vs. altruism, economics vs. ethics, individual vs. society] to the opposition of short-run and long-run interests" (1957, p. 55). This may be true of Mises's brand of "utilitarianism," as it is true of those categorical doctrines of social harmony that stress reciprocity, but it is not true of any maximizing doctrine of social harmony.

It is instructive to contrast Mises with Henry Hazlitt on this point. Although Hazlitt, who describes himself as a utilitarian, believes that "for 99 percent of the people 99 percent of the time, the actions called for by enlightened self-interest and morality are identical" (1964, p. 124), "[t]here remains the rare case when the individual must be called upon to make a 'genuine' sacrifice" (p. 125). He cites Bentham's argument that we can be forced to help in Good Samaritan situations if the cost to us is not too great, and as an example he mentions forcing a doctor to "attend a patient suffering from a contagious disease" or to aid victims of an epidemic (p. 111). In these cases there is a conflict between long-term self-interest and social utility, and the maximizing-utilitarian sides with social utility. Mises, on the other hand, never admits to such a conflict, but repeatedly claims, as we have seen, that one of the major discoveries of "utilitarianism" is that there is no such conflict.[10]

With regard to the second objection to utilitarianism, given that Mises believes that only ordinal comparisons of utility can be made and that interpersonal comparisons of utility make no sense, it would be surprising if he were then to try to base his moral theory upon the maximization of utility. In fact, he is explicitly critical of any such doctrine:

> Some economists believe that it is the task of economics to establish how in the whole of society the greatest possible satisfaction of all people or of the greatest number could be attained. They do not realize that there is no method which would allow us to measure the

[10]Even Mises's defense of conscription (one of his few lapses from a pure libertarian position) is not cast in terms of maximizing utility, but as a condition that may sometimes be necessary in order to preserve society from "ruthless oppressors" (1966, p. 282). Underlying his argument is the assumption that defense is a public good. This assumption met with little resistance, even among categorical harmonists (Spencer, for example, makes a similar case for conscription [1978, p. 87]), until the public goods argument itself was challenged by Rothbard (1962, pp. 883–90; 1970, ch. 1).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> state of satisfaction attained by various individuals. They misconstrue the character of judgments which are based on the comparison between various people's happiness. While expressing arbitrary value judgments, they believe themselves to be establishing facts. (Mises 1966, p. 242)

He then adds, "The reformers searching for the maximum of general satisfaction have told us merely what state of other people's affairs would best suit them" (1966, p. 243). In another context he raises the question, "Is society, people asked, merely a sum of individuals or is it more than this and thereby an entity endowed with independent reality? The question is nonsensical. Society is neither the sum of individuals nor more nor less. Arithmetical concepts cannot be applied to the matter" (1957, pp. 251–52).[11]

It should be emphasized that a comparative harmonist cannot escape Mises's objection against making judgments based on interpersonal comparisons of utility by resorting to such devices as assuming the role of an impartial spectator or making decisions behind a veil of ignorance. In fact, Mises explicitly criticizes the "old liberals" for assuming the stance of a "perfect king" whose only objective is to make his citizens happy (a precursor to the impartial spectator):

> [T]he economists compare this hypothetical system [embodying their own value judgments], which in their eyes embodies the moral law itself, with the market economy. The best they can say of the market economy is that it does not bring about a state of affairs different from that produced by the supremacy of the perfect autocrat. They approve of the market economy only because its operation, as they see it, ultimately attains the same results the perfect king would aim at. (Mises 1966, p. 691)

Mises contends that the fiction of the "perfect king" contributed to the modern notion of a godlike state.

Although one can find passages where Mises quotes Bentham's "greatest happiness" principle without comment (e.g., 1966, p. 175), on other occasions he is rather dismissive. For instance, he characterizes it as expressing "not very aptly" the view that laissez-faire liberalism does not favor any special group (1927, p. 7). In another passage he interprets it as simply meaning that social man "must adjust his conduct to the requirements of social cooperation and look upon his fellow men's success as an indispensable condition of his

[11]Contrast Mill's statement that "the truths of arithmetic are applicable to the valuation of happiness, as of all other measurable quantities" (Mill 1971, p. 56).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

own" (1966, p. 833). He goes on say that "if we interpret welfare in this manner, the concept is void of any special significance. It can be invoked for the justification of every variety of social organization. . . . A principle that is broad enough to cover all doctrines, however, conflicting with one another, is of no use at all" (1966, p. 834).[12]

In summary, Mises believed, like Spencer and Herbert, that it was legitimate to speak of the general welfare as the ultimate goal of morality, but also like Spencer and Herbert, he did not believe that one could give this principle any operational content. Its main value is that it distinguishes the social harmonist from the moral intuitionist, but there is always the danger that it will be used as a cover for special interests. As Mises stresses, "No decent man likes to be so rash as to raise objections against the realization of welfare"; however, "in the mouths of the welfare propagandists the notion of welfare has a definite meaning. They intentionally employ a term, the generally accepted connotation of which precludes any opposition" (1966, p. 834). Although Mises does not believe that an appeal to the general welfare can provide a definite guide to policy, he does not want to play into the hands of the welfare propagandists by being misinterpreted as being opposed to the general welfare.

Freedom is Indivisible

Having argued that Mises is not a comparative harmonist, but actually an astute critic of any maximizing moral framework, we must now consider whether he can more properly be described as a categorical harmonist. This brings us back to the central question with which we began: How could Mises be both a principled defender of laissez faire and a defender of the doctrine of social expediency? Our argument so far has been that the passages where Mises explicitly defends social expediency can be interpreted as defending the functionalist doctrine that morality is concerned with preserving society and attacking any appeal to mysteriously intuited principles. The question remains as to whether Mises's principled approach to laissez faire is a categorical approach.

[12]Mises made a similar statement in his final book: "That every human action has to be judged and is judged by its fruits or results is an old truism. It is a principle with regard to which the Gospels agree with the often badly misunderstood teachings of utilitarian philosophy. But the crux is that people widely differ from one another in their appraisal of the results. What some consider as good or best is often passionately rejected by others as entirely bad. The utopians did not bother to tell us what arrangement of affairs of state would best satisfy their fellow citizens. They merely expounded what conditions of the rest of mankind would be most satisfactory to themselves" (1962, pp. 96–97).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

As we have seen, for the categorical harmonist social harmony is not a relative, i.e., comparative matter, but a black-and-white, i.e., categorical matter. In Auberon Herbert's words, "It must be the battle of principles—the principle of liberty against the principle of force" (Herbert 1978, p.51); "force and reason . . . are the two opposite poles" (p. 91). "Force—whether disguised or not under the forms of voting—has but one meaning. It means universal confusion and strife" (p. 335). Mises in very similar words contrasts the "principle of violence" and the "principle of peace": "Violence and law, war and peace, are the two poles of social life" (1922, p. 34). "History is a struggle between two principles, the peaceful principle, which advances the development of trade, and the militarist-imperialist principle, which interprets society not as a friendly division of labor, but as the forcible repression of some members by others" (1922, p. 268). Furthermore, the principle of violence cannot form the basis of a social coherent theory: "Try to realize completely the principle of violence, even only in thought, and its anti-social character is unmasked. It leads to chaos, to the war of all against all. No sophistry can evade that. All anti-liberal social theories must necessarily remain fragments or arrive at the most absurd conclusions" (1922, p. 37). "It is impossible to defend honestly the case for violence against the case for peaceful cooperation. Thus the advocates of violence are resorting to the trick of calling the methods of violence and threat of violence to which they resort 'nonviolence'. . . . The fundamental antagonism between the realm of mutual peaceful agreement and that of compulsion and coercion cannot be eradicated by idle talk about two 'sectors' of the economy, the private and the public. There is no conciliation between constraint and spontaneity" (1968, p. 37).

For Mises the sole justification for force is social preservation:

> Society welcomes as members all who can see the benefit of peace and social collaboration in work. It is to the personal advantage of every individual that he should be treated as a citizen with equal rights. But the man who, ignoring the advantages of peaceful collaboration, prefers to fight and refuses to fit himself into the social order, must be fought like a dangerous animal. It is necessary to take up this attitude against the anti-social criminal and savage tribes. Liberalism can approve of war only as a defense. For the rest it sees in war the anti-social principle by which social cooperation is annihilated. (1922, p. 284)

Note that Mises, like Locke and other categorical harmonists, compares the anti-social individual to a dangerous animal. Likewise, for

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Mises, "[a]n unbridgeable gulf separates man from all those beings that lack the ability to grasp the meaning of social cooperation" (1962, p. 105). Unfortunately, not every member of our species can cross this gulf, for "[t]here have always been people who were emotionally unfit to conceive the fundamental principle of cooperation under the system of the division of tasks" (1962, pp. 88–89).[13]

Mises's categorical approach is perhaps best represented by his claim that "freedom is indivisible" (1957, p. 376), and his rejection of a middle way between socialism and capitalism (1950b). "The liberal program is an indivisible and indissoluble whole, not an arbitrary assembled patchwork of diverse components. Its various parts condition one another. The idea that political freedom can be preserved in the absence of economic freedom, and vice versa, is an illusion" (1949a, p. 38). The same principle is appealed to when Mises argues against interventionism: "There is no middle way. Control is indivisible" (1949c, p. 55).[14]

[13]Mises has very little to say about the justification of punishment. On a number of occasions he does say that force must be used to protect society, e.g., "In order to preserve peaceful cooperation, one must be ready to resort to violent suppression of those disturbing the peace" (1950a, p. 303). He does note that, "To punish criminal offenses committed in a state of emotional excitement or intoxication more mildly than other offenses is tantamount to encouraging such excesses" (1966, p. 16). This might be taken to mean that he holds a deterrence theory of punishment. This does not mean, however, that his position is one of maximization. Categorical harmonists recognize that punishment has a deterrence effect, but they typically believe that this must be subject to proportionality—i.e., one must not punish a person more severely than his anti-social act would merit. According to Locke, one "may bring such evil on any one, who hath transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others, from doing the like mischief," but one may do so "only to retribute to him . . . what is proportionate to his Transgression" (Locke 1988, p. 272). At least twice Mises mentions the possibility of considering criminals to be mentally ill, but he does so for the sake of argument, not because he agrees with this premise: "We may agree that he who acts antisocially should be considered mentally sick and in need of care. But as long as not all are cured . . . . some provision must be taken lest they jeopardize society" (1966, p. 149; 1944, p. 48).

[14]Herbert likewise argued that freedom is indivisible: "The nature of man is indivisible; you cannot cut him across, and give one share of him to the state and leave the other for himself" (1978, p. 140). The view that there is no middle way is common to the natural rights tradition. As we have seen, Locke contrasted the "common law of reason" with the "rule . . . of force and violence" (1988, p. 279). He was just as explicit in his *Letter on Toleration*: "There are two sorts of contests amongst men; the one managed by law, the other by force: and they are of that nature, that where the one ends, the other always begins" (Locke 1991, p. 45). Lysander Spooner also makes use of a similar "no middle ground argument": "There is . . . no middle ground between absolute communism, on the one hand, which holds that a man has a right to lay his hands on any thing, which has no other man's hands upon it, no matter who may have been the producer; and the principle of individual property, on the other hand, which says that each man has an absolute dominion, as against all other men, over the products and acquisitions of his own labor, whether he retains them in his actual possession, or not" (Spooner 1855, p. 88).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Although he does not explicitly distinguish them, Mises has two arguments against a middle way.[15] The first argument is the "tar-baby" argument. Like Br'er Rabbit and the Tar Baby, each act of intervention creates more problems than it solves and leads to new interventions. This process escalates until one has created such a mess that it is almost impossible to extract oneself. This argument is especially applicable to economic policies such as price controls (Mises 1950b, pp. 22–24), but it can also be applied to "social" policies such as drug controls (Thornton 1991).

Mises's other argument against a middle way is the the "slippery-slope" argument. He argues, for example, that government intervention *implies* socialism:

> All these champions of interventionism fail to realize that their program thus implies the establishment of full government supremacy in all economic matters. . . . Thus the doctrine and the practice of interventionism ultimately tend to abandon what originally distinguished them from outright socialism and to adopt entirely the principles of totalitarian all-round planning. (Mises 1966, pp. 723–24)

Mises is not saying that the slide to totalitarianism is inevitable. No one can predict the outcome. The slide down the slope may be slow or it may be fast, and it may be halted before descending all the way to the bottom. But assuming, as Mises does, that the social world is ultimately ruled by ideas, then to sacrifice principle for the sake of social expediency is to kick over the intellectual prop which has prevented descent down the slide to totalitarianism. Mises makes this quite clear when arguing against the regulation of drugs:

> [O]nce the principle is admitted that it is the duty of government to protect the individual against his own foolishness, no serious objections can be advanced against further encroachments. . . . And why limit the government's benevolent providence to the protection of the individual's body only? Is not the harm a man can inflict on his mind and soul even more disastrous than any bodily evils? . . . The mischief done by bad ideologies, surely, is much more pernicious, both for the individual and for the whole of society, than that done by narcotic drugs. (Mises 1966, pp. 733–34)

[15]Note, however, that when discussing "why all men should receive equal treatment under the law" (1927, p. 28), Mises does explicitly distinguish two arguments that parallel the distinction I make above. The first is an economic argument concerning the conditions for prosperity, the second, a moral or social harmonist argument concerning the conditions for social peace.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

For Mises the issue is one of principle: "We see that as soon as we surrender the principle that the state should not interfere in any questions touching on the individual's mode of life, we end by regulating and restricting the latter down to the smallest detail" (1927, p. 54).

The slippery-slope argument has played a central role in the categorical defense of rights.[16] Unlike comparative harmonists, categorical harmonists are not moved by the purported fact that an exception will have certain positive consequences. They see this as the first step down a slippery slope. Although comparative harmonists may recognize the value of a principled approach and the danger of allowing exceptions, they argue that the absolutist, categorical approach implied by the slippery-slope argument is too extreme. They may admit that intervention often has negative consequences that outweigh any positive benefits, but insist that this must be established case by case.

Such an attitude is exemplified by Yeager in a panel discussion on utilitarianism and natural rights: "I do not know for sure what position to take on things. I do not have an infallible pipeline to the truth" (Shah 1988, p. 9). When questioned as to what position he takes with regard to insider trading his response is: "I cannot take a firm position for or against insider trading. If I were to study the actual factual details of particular cases, I do not know whether I would come out condemning it or not" (p. 5). Rothbard, another panelist, is quick to point out that Yeager's answer "shows the difference between viewing liberty and the free market as an organic tendency versus holding it as an absolute principle" (i.e., between what I have been calling a comparative and a categorical approach), and adds, "I am in favor of saying that there is nothing wrong with insider trading except for breach of contract" (p. 5).

It seems to me that there is little doubt that Mises, in spite of his professed utilitarianism, would have sided with Rothbard on this issue. It is because Mises takes such a principled stance with regard to government intervention that he is often perceived as "dogmatic." Critics ask how Mises can dismiss the middle way of intervention in such an *a priori* fashion? For the comparative harmonist one must weigh the evidence in each case—any *a priori* claim to the contrary is a veiled appeal to intuition or "an infallible pipeline to the truth."

[16]Herbert, for example, argues in response to those who do not see a sharp dichotomy between the principle of force and the principle of peace and who want to "judge each case on its merits" that "apart from any fixed principle, the merits will be always determined by our varying personal inclinations. It is all slope, ever falling away into slope, with no firm level standing place to be found anywhere" (Herbert 1978, p. 281).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Liberty of Conscience

The charge that the categorical harmonist must fall back on intuition has some historical justification. As we have seen, the categorical harmonist's stance is that force is only justified against those who are not reasonable—i.e., when rational interaction breaks down. The problem has always been deciding when this happens. Clearly, if one person uses force against another person who is amenable to reason, then the user of force is the one who has opted out of rational discourse. But this still leaves the problem of determining when the other party is or is not amenable to reason. The fact that my opponent does not agree with me may only mean that I have not given him a good reason to agree.

Up until the sixteenth century, categorical harmonists, as represented by natural law theorists, still relied heavily upon our supposed common religious and moral intuitions to determine what is reasonable. But in the context of the religious wars of the sixteenth century, social theorists started to face the fact that people's intuitions differed. Whereas during the Middle Ages the foundation for society had been considered to be "peace and unity," it was realized by a few social theorists in the sixteenth century, such as Sebastian Castellio, that coerced unity was the major cause of strife. This became the central insight of the seventeenth century defenders of toleration, e.g., Roger Williams, Henry Robinson, and the Levellers. The argument was summarized by Locke at the end of the seventeenth century: "It is not the diversity of opinions, which cannot be avoided; but the refusal of toleration to those that are of different opinions, which might have been granted, that has produced all the bustles and wars, that have been in the Christian world, upon account of religion" (Locke 1991, p. 52).

The major theme of these social theorists was that any defense of toleration must be a principled defense. In discussing the question of a state sanctioned church, Locke asks which church are we to choose? He notes that it "will be answered, undoubtedly, that it is the orthodox church which has the right of authority over the erroneous or heretical." To which he scornfully replies, "This is, in great and specious words, to say just nothing at all. For every church is orthodox to itself; to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereupon it pronounces to be error" (Locke 1991, p. 24). Nor can we allow the prince to choose, for "the religion of every prince is orthodox to himself. . . . If it be once permitted to introduce anything into religion, by the means of laws and penalties, there can be no bounds put to it; but it will, in the same

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

manner, be lawful to alter everything, according to that rule of truth which the magistrate has framed unto himself" (Locke 1991, p. 37). In other words, there is no middle ground.

It should be stressed that Locke's insight that "every one is orthodox to himself" (Locke 1991, p. 14), did not imply relativism. Locke believed that there was "but one truth, one way to heaven" (Locke 1991, p. 19). His point was that men disagreed about what this truth was, and that it was intellectually dishonest to assume away this disagreement. Diversity of opinion must be our starting point—it is implied by each man's uniqueness, his fallibility, and the scarcity of time. No one has "the leisure, patience, and means, to collect together all the proofs concerning most of the opinions he has. . . . And yet we are forced to determine ourselves on the one side or the other. The conduct of our lives, and the management of our great concerns, will not bear delay" (Locke 1933, p. 382). Any moral theory that ignores scarcity (including that of time) and diversity (including that of opinions) fails to apply to the world as it is.

Thus if there is to be social harmony, there is no alternative but to tolerate each other. Quoting Locke again:

> Since therefore it is unavoidable to the greatest part of men, if not all, to have several opinions, without certain and indubitable proofs of their truth; and it carries too great an imputation of ignorance, lightness, or folly, for men to quit and renounce their former tenets presently upon the offer of an argument, which they cannot immediately answer, and show the insufficiency of: it would methinks become all men to maintain peace, and the common offices of humanity and friendship, in the diversity of opinions; since we cannot reasonably expect, that anyone should readily and obsequiously quit his own opinion, and embrace ours with a blind resignation to an authority, which the understanding of man acknowledges not. (1933, p. 382)

Later natural rights theorists realized that this argument for religious tolerance could be generalized to apply to all opinions and practices. Spencer, for example, argued that just as "[t]he advocate of religious freedom does not acknowledge the right of any council, or bishop, to choose for him what he shall believe or what he shall reject[,] [s]o the opponent of a poor law, does not acknowledge the right of any government, or commissioner, to choose for him who are worthy of his charity, and who are not" (Spencer 1981, p. 197). Herbert applied this same argument against public education (1978, p. 73) and compulsory taxes. In the case of the latter he argued,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> Because free countries have affirmed many years ago that a compulsory church rate is immoral and oppressive, for the sake of the burden laid upon individual consciences; and in affirming this truth they have unconsciously affirmed the wider truth, that *every tax or rate, forcibly taken from an unwilling person, is immoral and oppressive*. The human conscience knows no distinction between church rates and other compulsory rates and taxes. The sin lies in the disregarding of each other's convictions, and is not affected by the subject matter of the tax. (Herbert 1978, pp. 393–94)

Note that this general argument against coercion is basically the same argument that Locke used against religious intolerance—given that people disagree about the best course of action, on the one hand, and the necessity of action (and the impossibility of waiting until there is agreement), on the other hand, the only peaceful solution is toleration, i.e., the mutual respect of each other's rights. This argument was also the basis for Spencer's case against utilitarianism: Given all the conflicting alternative proposals advocated under the banner of utility, if nothing were "to be done till all agreed upon them, we might stand still to the end of time." On the other hand, "[i]f each man carried out, independently of a state power, his own notions of what would best secure 'the greatest happiness of the greatest number,' society would quickly lapse into confusion" (1970, p. 16). To avoid this dilemma, the utilitarian has to fall back upon an "umpire," i.e., the government, for without the authority of government "such a morality must ever remain inoperative" (p. 16). Consequently, "Let but rulers think, or profess to think, that their measures will benefit the community, and your philosophy stands mute in the presence of the most egregious folly, or the blackest misconduct" (Spencer 1970, p. 4). Once we clear away all the euphemisms, the stark reality of the comparative approach (whether direct or indirect) stares us in the face: whoever can gain control of government is who decides. Once the decision as to what is and is not permitted is given to government, then as Locke asserted, "there can be no bounds put to it" (Locke 1991, p. 37).

Central to Spencer's argument is the insight that utilitarianism as a moral doctrine is "inoperative" and has to fall back upon the authority of the government. In other words, utilitarianism fails to satisfy the requirement that a moral principle be "praxeologically realizable" or "operational," to use Hans-Hermann Hoppe's terminology (1988a, p. 261).[17] This was also Spencer's objection against

[17] As Hoppe explains, "it must be possible for us, who invariably must act and employ resources, to actually implement such a criterion and consistently act upon it." Given

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

proposals for a "right to a maintenance":

> One party says that a bare subsistence is all that is implied. Another, that the applicant can demand all the comforts usually enjoyed by those in his station. Another, that he may as fairly claim the luxuries of life as those above him. And the extreme party will be content with nothing short of the socialist principle, of community of property. Who is to say which of these is the true expression of the right? The gradations are infinite, and how can it be decided where the claim begins and where it ends? Who can tell the rate-payer how much of his property can be justly demanded by his fellow creature? Who can tell the pauper when he asks for more pay, that he receives just as much as he is entitled to? or can explain to him why he has a right to what he already receives, but no right to anything more? And yet, if this were really a right, ought it not be capable of such a definition? (Spencer 1981, p. 205)

This inherent indeterminacy was what Herbert had in mind when he said that no one can draw a "force line," i.e., a line between the legitimate (apart from self-defense) and illegitimate uses of force (1978, p.89). In response to the suggestion that we "allow society . . . to decide such matters as we are all pretty well agreed should be so decided," Herbert replies, "[t]here never can be agreement amongst men as to what these matters are" (p. 131). Ultimately, one ends up "sanctioning not only the right of some men to coerce others, but their right to decide how and when and for what purposes they shall coerce others. It is the power holders, freed from any general principle that controls and directs them, who have to decide as to the limits and application of their own power. For who else can do so?" (pp. 131–32). The argument is not that it is difficult to draw a line between the proper and the improper use of force. Anyone can draw a line. The problem is that no two people agree where this line should be drawn. There are only two stopping points—the doctrine that force can only be used in self-defense and the doctrine that might is right. The point that Herbert continually stresses is that when the issue is seen as where to draw this "force line," i.e., the attempt to find a middle way somewhere between these two points, the decision will always be

---

some criterion such as the greatest happiness or the stance of an impartial spectator, Hoppe asks, "what if [we] . . . do not choose the same but incompatible societies—the criterion of maximum average utility has already done its work—but there is still disagreement" (Hoppe 1988a, p. 262). Elsewhere Hoppe notes that "in advocating a consequentialist position, utilitarianism is strictly speaking no ethic at all when it fails to answer the all-decisive question 'what am I justified in doing now?'" (1988b, p. 54).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

made by those who have the most power, i.e., the question will ultimately be decided in favor of might.[18]

This brings us to the most misunderstood part of the categorical harmonist's argument—the appeal to *equal* rights. In Spencer's words, quoted earlier, the crucial move was that "in the absence of proof that some may do what they will without limit, while others may not, mutual limitation is necessitated" (Spencer 1981, p. 150). Note the similarity between Spencer's argument and Locke's with regard to toleration. After arguing that all churches are orthodox to themselves, Locke concludes, "So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal" (Locke 1991, p. 24). The point is not that the doctrines are equally good, but that there is no evidence that anyone on earth has been given the prerogative to decide. As Herbert asks, "Who shall decide between us? There is no moral tribunal before which you can summon unlimited power" (1978, p. 312).

Mises's Categorical Defense of Liberty

In an earlier section we saw that Mises takes a principled stance to liberty, and how this is in line with the categorical moral tradition. In this section I argue that the basis for his principled stance is the same as that developed by Locke (and others before him) and generalized by Spencer and Herbert.

First, note that with regard to the critical issue of toleration, Mises takes a principled approach:

> Liberalism demands tolerance as a matter of principle, not from opportunism. It demands toleration even of obviously nonsensical

[18]This is a common theme running throughout Herbert's writings: "Admit that any one . . . may restrain by force the exercise of the faculties of others, and in what sea of moral confusion you are at once plunged. Who is to decide which is the better man or the more civilized race, or how much freedom is to be allowed or disallowed. To settle this question men must sit as judges in their own case; and this means that the strongest will declare themselves the most civilized, and will assign such portions of freedom as they choose to the rest of the nation or the rest of the world as the case may be. Are you prepared for this?" (1978, p. 98). "Once admit that force is right in itself, and then you cannot pick out any special sect or party, confer special privileges upon them, and declare that they alone, and nobody else are entitled to use force. That would be a mere arbitrary and fanciful selection, as arbitrary and fanciful as picking out certain opinions, and declaring that these are orthodox, and that all other opinions are heterodox. If force is good in the hands of some men, it is good in the hands of other men; if it is a good instrument to serve some causes, it is good to serve other causes" (p. 231). "[U]ntil they have found some law by which they can distinguish the right from the wrong use of power, by which they can justly satisfy not only their own minds but the minds of others, they are simply leaving in suspension the greatest matter that affects human beings" (pp. 132–33).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> teachings, absurd forms of heterodoxy, and childishly silly superstitions. It demands toleration for doctrines and opinions that it deems detrimental and ruinous to society and even for movements that it indefatigably combats. For what impels liberalism to demand and accord toleration is not consideration for the content of the doctrine to be tolerated, but the knowledge that only tolerance can create and preserve the condition of social peace without which humanity must relapse into the barbarism and penury of centuries long past. (Mises 1927, pp. 56–57)

It should be emphasized that Mises's defense of toleration is "utilitarian" only in the sense that every categorical harmonist's argument is utilitarian—it is concerned with the conditions that make social harmony possible. It is only because most comparative harmonists abandon their comparative approach when it comes to the question of toleration and take a principled approach that this is not noticed.

Second, Mises, when discussing toleration, draws on the same insight expressed by Locke's slogan "everyone is orthodox to himself" (Locke 1991, p. 14): "Mere opportunists excepted, everyone is convinced of the rightness of his opinions. But, if such a conviction by itself were a justification for intolerance, then everyone would have a right to coerce and persecute everyone else of another way of thinking. . . . In such a case there must always be war and enmity between men" (1922, pp. 166–67). According to Mises, one of the major "blunders" of rationalism was its "neglect of the problem of erroneous thinking. Most of the rationalist philosophers failed to see that even honest men, sincerely devoted to the search for truth, could err. . . . A doctrine of which they disapproved could in their opinion have been prompted only by purposeful deceit" (1957, p. 270). Mises is here simply applying the insight of Locke concerning religious disagreements to rationalism.

Third, Mises, like Locke and Spencer, objects to the uniformitarian assumption that underlies most moral systems: "One of the motives that impel men to search for an absolute and immutable standard of value is the presumption that peaceful cooperation is possible only among people guided by the same judgments of value" (1957, p. 51). According to Mises, rationalists made a similar mistake, which is their other major blunder: "[T]hey assumed that all men are endowed with the same power of reasoning" (1957, p. 270). The fact of the matter is that there is diversity of opinion. Postulating immutable standards of value, even if true, will not make this diversity of opinion go away, nor will a faith in the rationality of man. The great insight of laissez-faire liberalism is that a free society "can function

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in spite of the fact that its members disagree in many judgments of value" (1957, p. 61; 1966, p. 693).

Finally, Mises, like Spencer and Herbert, sees the case for liberty as a generalization of the case for religious toleration. The socialist is just as blind as the religious fanatic to the insight that everyone is orthodox to himself:

> No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power . . . could act in a way which he himself disapproves. A socialist advocates socialism because he is fully convinced that the supreme dictator of the socialist commonwealth will be reasonable from his—the individual socialist's—point of view, that he will aim at those ends of which he—the individual socialist—fully approves, and that he will try to attain these ends by choosing means which he—the individual socialist—would also choose. Every socialist calls only that system a genuinely socialist system in which these conditions are completely fulfilled; all other brands claiming the name socialism are counterfeit systems entirely different from true socialism. (Mises 1966, pp. 692–93)

In another passage Mises is even more explicit in identifying socialism with intolerance and fanaticism:

> It is customary to call the point of view of the advocates of the welfare state the "social" point of view as distinguished from the "individualistic" and "selfish" point of view of the champions of the rule of law. In fact, however, the supporters of the welfare state are utterly anti-social and *intolerant zealots*. For their ideology tacitly implies that the government will execute what they themselves deem right and beneficial. They entirely disregard the possibility that there could arise disagreement with regard to the question of what is right and expedient and what is not. (Mises 1922, pp. 520–21; italics added)

The parallels between Mises's case for a principled, categorical approach to social harmony and that of Locke, Spencer and Herbert is somewhat obscured by Mises's unfortunate insistence that all values are arbitrary. It should be stressed, however, that Mises's argument in no way depends upon this premise, and in fact would be strengthened without it. The fundamental premise is not that ultimate ends, unlike means, are arbitrary and not amenable to rational argument. The starting point for social philosophy, rather, is that people disagree with regard to both means and ends. Even if ultimate ends were totally arbitrary, as Mises asserts, there would be no

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

problem if everyone happened to agree on these ends. On the other hand, even if questions of means are in principle rationally determinable, insofar as we have not yet resolved which means are best and thus come to an agreement, we are faced with a moral problem of what to do in the meantime. In fact, in spite of Mises's stress on the arbitrariness of ends and the rationality of means, he admits that we often disagree about means (1966, p. 692; 1957, p. 174). He also points out that the distinction between ends and means is not always straightforward—that what are ends for some people may be means for others (1957, p. 37).

One must be careful to not let Mises's assertions about the arbitrariness of values cause one to miss his main point. When Mises attacks absolute values, he almost always has in mind the belief that such values are handed down from Providence (1922, p. 35) and are independent of society (1966, p. 720). Such "heteronomous doctrines" (1966, p. 883) are antithetical to Mises's methodological individualism: "The rejection of methodological individualism implies the assumption that the behavior of men is directed by some mysterious forces that defy any analysis and description" (1962, p. 82). Furthermore, when Mises asserts that all value judgments are personal (1957, pp. 14, 59), usually what he is attacking is the belief that one has the right to impose these absolute values on others. This may not be apparent to the reader because of an ambiguity in Mises's writings between "personal" in the sense of "arbitrary" or a "matter of taste" (like ice cream), and "personal" in the sense of "not to be imposed on others." Although Mises is not careful to distinguish these two senses of "personal," clearly it is only the latter with which he is concerned. This is illustrated by the following passage: "If a man assigns a higher value to the concerns of the collective than to his other concerns, and acts accordingly, that is his affair. So long as the collectivist philosophers proceed in this way, no objection can be raised. But they argue differently. They elevate their personal judgments of value to the dignity of an absolute standard of value" (1957, p. 59). As Mises makes clear a few pages later, he is not insisting that the collectivist admit that his beliefs are arbitrary; what he is attacking is coercion: "There is, of course, but one way to make one's own judgments of value supreme. One must beat into submission all those dissenting" (1957, pp. 60–61).

Finally, although I agree with Rothbard that Mises's sweeping statement that all values are arbitrary is itself arbitrary (Rothbard 1982, p. 212; see also Tabarrok 1990), it seems to me that a coherent and plausible case can be made for Mises's nonjustificationist stance with regard to social harmony. The categorical harmonist's argument

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

for rights presupposes a commitment to social harmony. Unlike many natural rights and natural law theorists, Mises believes that it is impossible to give any ultimate reason why one should be committed to peaceful cooperation. Instead, he treats this commitment as a hypothetical imperative: "Praxeology and economics do not say that men should peacefully cooperate within the frame of societal bonds; they merely say that men must act this way if they want to make their actions more successful than otherwise" (1966, p. 883). When face to face with the social nihilist, i.e., someone who believes that might is right, it is not clear what the social harmonist could say that would be relevant. This is not to say that one's commitment to social harmony is arbitrary. Mises *argues* that we can ignore those who have no regard for social harmony—e.g., such exceptional cases as Caligula—because of "their tendency to be self-destructive" (1933, p. 38). That is, we can give reasons for ignoring such cases. What we cannot do, however, is provide arguments that would convince the Caligulas of this world. The problem is that argument presupposes that conflict-free interaction is possible (Hoppe 1988a, p. 63; 1989, p. 132), whereas such interaction is precisely what the nihilist rejects. He may use words in ways that resemble, and are parasitic upon, argument, but he is not committed to resolving anything by argument. Argument for the nihilist is simply an expedient, an ammunition-savings measure. The most appropriate response to the nihilist (who has demonstrated by his actions that he really is a nihilist) is to reach for our clubs and hit him over the head. Given that he believes that might is right, he can hardly file a moral complaint against us for such actions.

The real intellectual challenge to the social harmonist comes not from the overt nihilist, but the righteous nihilist—the person who claims that he is committed to social harmony, but uses force against anyone who disagrees with him on the grounds that they are being irrational. It is the righteous nihilist (or "theocrat" [1966, p. 151; 1962, p. 107; 1949a, p. 43]) who is the target of Mises's charge of arbitrariness, just as he was the target of Locke, Spencer, and Herbert. And it is in this light, I believe, that we should read Mises's repeated attacks on absolute and immutable ethical principles. In fact, in this regard Mises often uses language that is reminiscent of that used by Herbert. For example, just as Mises sarcastically speaks of "those individuals to whom, by the mysterious decrees of some mysterious agency, the task of determining the collective will and directing the actions of the collective has been entrusted" (1962, p. 107), Herbert characterizes the socialist (and other users of force) as trying to persuade us "that there exists a mysterious

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

dispensation given from some unknown quarter in his own special favor" (Herbert 1978, p. 232).

Natural versus Conventional Property Rights

If Mises really is a categorical harmonist, then this should be reflected in his defense of private property. For the most part this is the case. Social cooperation under the division of labor, peace, and property are so closely tied together for Mises that he uses them interchangeably when talking about the nature of society and the goal of liberalism: "That Liberalism aims at the protection of property and that it rejects war are two expressions of one and the same principle" (1922, p. 59). "The basis and starting point of social cooperation lie in peacemaking, which consists in the mutual recognition of the 'state of property'" (1922, p. 467). "The program of liberalism, therefore, if condensed into a single word, would have to read: *property*, that is, private ownership of the means of production. . . . All the other demands of liberalism result from this fundamental demand" (1927, p. 19).

But what are we then to make of Mises's statement that private property "is a human device" and is "not sacred" (1966, p. 683)? Even more troublesome is his statement that if liberals "considered the abolition of the institution of private property to be in the general interest, they would advocate that it be abolished, no matter how prejudicial such a policy might be to the interests of property owners" (1927, p. 30).

The first statement is problematic only if we take it metaphorically to mean that property rights are arbitrary conventions. However, Mises is simply asserting, as the next sentence makes clear, that private property was not conferred on man by God or Nature, but is a human discovery which has a definite history. Although some natural rights theorists might disagree with this, Herbert Spencer would not be one of them. I believe the second statement (about his willingness to abolish property if it were in the general interest) should be taken with a rhetorical grain of salt. What Mises is stressing is that his defense of private property is not based on some special intuition, but upon the fact that private property is intrinsically linked with the very conditions for social harmony.

There is no question that Mises rejects the idea that private property is arbitrary. His major complaint against most moral philosophers was their conviction that "there was in the course of social events no such regularity and invariance of phenomena as had been found in the operation of human reasoning and in the sequence of natural phenomena. They did not search for the laws

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of social cooperation because they thought that man could organize society as he pleased" (1966, p. 2). And he explicitly states that capitalism "is the only possible social system. One may undertake to modify one or another of its features as long as in doing so one does not affect the essence and foundation of the whole social order, viz., private property" (1927, p. 88).

The only question at issue is whether Mises's defense of property rights is a pragmatic defense of the status quo—i.e., a defense of currently existing titles regardless of how they were acquired. There are several passages that seem to suggest this: "The basis and starting point of social cooperation lie in peacemaking, which consists in the mutual recognition of the 'state of property.' Out of *de facto having*, maintained by force, arises the legal concept of ownership" (1922, p. 467). "Law is a *settlement*, and end to strife, and avoidance of strife" (1922, p. 34; italics added). "Possession is protected even though it is, as the jurists say, no title. Not only honest but dishonest possessors, even robbers and thieves, may claim protection for their possessions" (1922, p. 34).

If these passages are interpreted to mean that possession is the whole of the law, not nine-tenths, then one can argue that Mises does not provide a principled but only a pragmatic, *ad hoc* defense of property. As Rothbard points out, any ethic relying upon such an *ad hoc* defense of property rights, "pushed to its logical conclusion, must also defend every criminal in the property that he has managed to expropriate," and is thus "ethically nihilistic" (Rothbard 1982, p. 52). Such a doctrine would imply that if A steals X from B, then A, being in possession of X, has a right to X. But it would also imply that if B "steals" X back from A, then B has a right to X. In other words, whoever can retain possession of X has a right to it—i.e., might is right.

Given the incoherence of such a doctrine, however, we should first look for an alternative interpretation before attributing such a viewpoint to Mises. I believe that the key is to be found in a passage a few pages later where he notes that under "the domination of the principle of violence," which he contrasts with the principle of peace, there can be "no peace; at best there [can be] a truce" (1922, p. 58). Here it would seem he is explicitly rejecting the *ad hoc*, pragmatic doctrine of property as a mere "truce." The question, then, is what is the difference between a "settlement" (of the earlier passage) and a "truce"?

If we look at the context of Mises's statement that "even robbers and thieves, may claim protection for their possessions," we see that Mises is concerned to refute those who argue that since existing

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

property titles have "sprung illegally from arbitrary acquisition and violent robbery" in the distant past, they are not legitimate (1922, p. 34). Again it is illuminating to compare Mises's argument with a similar passage from Spencer. When faced with a related argument—in this case the right of the poor to be maintained by the rich because of the past transgressions of the rich—Spencer does not deny that there were past transgressions, nor does he assert, in an *ad hoc* fashion, that such transgressions are irrelevant. Instead, he insists that the burden of proof is upon those who advocate the right to maintenance (Spencer 1981, p. 201). In particular, "when it can be shown that our poor are the children of the oppressed, and those who have to pay poor rates are the children of the oppressors, then the validity of the objection will be admitted; but that until this is shown to be the truth, or an approach to the truth, the objection may be disregarded" (1981, p. 192). The issue is one concerning on whom the burden of proof falls. Spencer's (and I believe, Mises's) position is not that existing property rights cannot be challenged, but that the burden of proof must fall on the challenger of *de facto* property rights. Only this position is praxeologically operational. Those who place the burden of proof on the *de facto* owner, and demand that he justify his right to use and dispose the object in question, implicitly assume that we can somehow take a disembodied stance, hovering above the physical world until all questions of rights have been satisfactorily decided.[19]

As we have seen, any coherent, operational ethical theory that is to apply to the world as it is, not as it is imagined to be in the dreams of the philosophers, must take into account two facts—scarcity, including scarcity of time, and diversity, including the diversity of opinions. In particular, it needs to recognize that people are never going to agree on how various resources ought to be used. Given that consensual joint control is impossible, the only peaceful alternative is divided control, i.e., private property rights. Furthermore, any coherent, operational ethical theory needs to recognize that people

[19]Mises's assertion that the notion of justice "makes sense only when approving or disapproving concrete conduct from the point of view of the valid laws of the country" (1966, p. 721) might seem to imply that all rights, including property rights, are those defined by the legal system. Such a legal positivist interpretation, however, conflicts with what Mises says elsewhere. For example, when discussing the natural law, he is critical of its "arbitrary prepossessions" but praises it for rejecting "legal positivism" and substituting the "idea that every valid law of a country was open to critical examination by reason" (1957, p. 48). I believe Mises's statements to the effect that there is "neither right nor wrong outside the social nexus" should be interpreted as attacks upon intuitionist critiques that are not grounded in the realities of society rather than appeals to the legal status quo.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

are never going to agree on how resources ought to be (optimally) divided up, any more than they are going to agree on how they ought to be used. Since man is a physical being who needs to use resources to survive and who at the very least needs a place to stand, the only peaceful alternative is to make a presumption in favor of current property holdings. This does not mean that robbers have the right to their plunder. The concept of a "presumption" in favor of current property rights only makes sense if it is coupled with the right to have restored property that has been taken.

This theory of rights, combining a presumption in favor of the *de facto* owner with the principle of restitution, might be appropriately labeled a *concrete* theory of rights. I believe that it is equivalent, at least in most essentials, to the Lockean *abstract* theory of rights. In particular, the libertarian homesteading axiom can be directly derived. Any ethic, if it is to be praxeologically operational—if it is to recognize the facts of scarcity and diversity—must start with the existing property distribution. Furthermore, if it is to really qualify as an ethical principle, providing a basis for conflict-free interaction and not be equivalent, for all practical purposes, to might is right, it must also provide for a principle of restitution. The *de facto* owner's presumptive right can only be challenged by showing that a prior right is being restored. By chaining this argument backwards until we reach the first user, the homesteading principle is established—the first user of something cannot have his possession challenged since there is no prior right to be restored. We are far removed from the Lockean state of nature, and there is little doubt that the chain of transfers from there to our current set of property titles has been broken by a large number of illicit acts. This often gives the (false) impression that according to the Lockean view we do not have any grounds to stand on. By starting with a presumption in favor of the current, *de facto* owner, and shifting the burden of proof to the challenger, hypothetical but unprovable past acts of usurpation are clearly seen as irrelevant. Although the passage of time does not turn crimes into venerable institutions, the passage of time does make the burden of proof for the challenger more and more difficult.

Finally, in passing, it should be noted that the right of the first user can be said to be an eternal right. Although Mises rejects all theories of eternal rights, what he is mainly concerned with attacking is the view that rights were somehow self-evident to everyone from the beginning of time. Property rights, however, are eternal in a different sense—they are not conventional. At no point in time did, or can, someone establish property rights willy-nilly. I cannot take your property, for example, and then declare that we will from now

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

on observe property rights. If I am serious about property rights, then I must make restitution. Even if the concept of property rights has not previously occurred to either of us, once it does, in order for us to observe these rights, we must be willing to make restitution for (recognized) past wrongs. Otherwise, our professed belief in property rights cannot be taken seriously. It is in this sense that property rights can be said to be eternal—they extend backward indefinitely in time.

Conclusion

Mises's utilitarianism is the exception that proves (i.e., tests) the rule, in this case, Rothbard's rule that utilitarianism cannot provide a principled defense of laissez-faire liberalism. Of course, Mises, like almost all defenders of laissez faire, used utilitarian (i.e., nonmoral functionalist) arguments to defend the unhampered market. But he also used moral arguments. My main purpose throughout this paper has been to show that Mises's moral "utilitarianism," in spite of his repeated attacks on natural law and natural rights, owes more to the principled, categorical moral framework of Spencer and Herbert, than to the maximizing, comparative moral framework of Bentham and Mill. Mises equated natural law and natural rights with intuitionism, and for this reason rejected them, but he did not reject the categorical moral framework that underlies much of that tradition. On the contrary, it was the comparative moral framework of utilitarianism that he rejected. Furthermore, the essential premises for his moral defense of laissez faire is not the arbitrariness of all values, but the facts of scarcity (including scarcity of time) and diversity (including diversity of opinion concerning values *and means*)—two facts that play an essential role in his praxeological methodology. Any coherent moral theory concerning the conditions for social harmony, as well as any coherent theory of economics, must take these two facts into account. It is this insight, articulated by Locke, that Mises turns into a powerful moral argument against socialism and in favor of laissez faire.[20]

[20]Mises's arguments for laissez faire and against socialism can be usefully divided into three classes: (1) nonmoral functionalist arguments concerning the best policies for promoting prosperity; (2) the economic calculation argument that socialism leads to social chaos; and (3) moral arguments concerning the conditions for social harmony. There is an interesting parallel with St. Thomas Aquinas's three arguments for preferring private property to communal property: (1) communal property undermines the incentive to work; (2) communal property leads to social confusion; and (3) communal property undermines social peace (Aquinas 1959, p. 169 [*Summa Theologica* II-II 66 2]). In his book on the economics of the late-scholastics Alejandro A. Chafuen notes that Mises's defense of property is similar to that of the late-scholastics (1986, p. 155).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

References

Aquinas, St. Thomas. 1959. *Selected Political Writings*. A. P. D'Entrèves, ed. Oxford: Basil Blackwell.

Chafuen, Alejandro A. 1986. *Christians for Freedom: Late-Scholastic Economics*. San Francisco: Ignatius Press.

Cicero, Marcus Tullius. 1991. *On Duties*. M. T. Griffin and E. M. Atkins, eds. New York: Cambridge University Press.

D'Entrèves, A. P. 1970. *Natural Law: An Introduction to the Philosophy of Law*. London: Hutchinson University Library.

Gray, John. 1989. *Liberalisms: Essays in Political Philosophy*. New York: Routledge.

Hayek, F. A. 1976. *Law, Legislation, and Liberty: The Mirage of Social Justice*. Chicago: University of Chicago Press.

Hazlitt, Henry. [1964] 1988. *The Foundation of Morality*. Lantham, Maryland: University Press.

Herbert, Auberon. 1978. *The Right and Wrong of Compulsion by the State and Other Essays*. Indianapolis: Liberty*Classics*.

Hoppe, Hans-Hermann. 1988a. "From the Economics of Laissez Faire to the Ethics of Libertarianism." In Walter Block and Llewellyn H. Rockwell, Jr., eds., *Man Economy and Liberty: Essays in Honor of Murray N. Rothbard*. Auburn, Ala: The Ludwig von Mises Institute. Pp. 56–76.

——. 1988b. "Utilitarians and Randians vs. Reason." *Liberty* 2, no. 2 (November): 53–54.

——. 1989. *A Theory of Socialism and Capitalism*. Norwell, Mass.: Kluwer Academic Publishers.

——. 1990. Review of *Man, Economy and Liberty: Essays in Honor of Murray N. Rothbard*. *Review of Austrian Economics* 4: 249–63.

Locke, John. 1933. *An Essay Concerning Human Understanding*. Selections in Edwin A. Burtt, ed. *The English Philosophers: From Bacon to Mill*. New York: The Modern Library. Pp. 238–402.

——. 1988. *Two Treatises of Government*. Peter Laslett, ed. New York: Cambridge University Press.

——. 1991. *A Letter Concerning Toleration*. John Horton and Susan Mendus, eds. New York: Routledge.

Mill, John Stuart. 1971. *Utilitarianism: With Critical Essays*. Samuel Gorowitz, ed. New York: Bobbs-Merrill.

Mises, Ludwig von. [1922] 1981. *Socialism: An Economic and Sociological Analysis*. Indianapolis: Liberty*Classics*.

——. [1927] 1985. *Liberalism: In the Classical Tradition*. Irvington-on-Hudson, New York: Foundation for Economic Education.

——. [1933] 1976. *Epistemological Problems of Economics*. New York: New York University Press.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

——. [1944] 1969. *Omnipotent Government: The Rise of Total State and Total War*. New Rochelle, New York: Arlington House.

——. [1945] 1990. "Economics as a Bridge for Interhuman Understanding." In *Economic Freedom and Intervention: An Anthology of Articles and Essays by Ludwig von Mises*. Bettina Bien Greaves, ed. Irvington-on-Hudson, New York: Foundation for Economic Education. Pp. 223–35.

——. [1947] 1981. *Planned Chaos*. "Epilogue." In *Socialism*. Indianapolis: Liberty*Classics*. Pp. 481–540.

——. [1949a] [1952] 1980. "Laissez Faire or Dictatorship." In *Planning for Freedom*. South Holland, Ill.: Libertarian Press. Pp. 36–49.

——. [1949b] 1990. "The Role of Doctrines in Human History." In *Money, Method, and the Market Process: Essays by Ludwig von Mises*. Richard M. Ebeling, ed. Norwell, Mass.: Kluwer Academic Publishers. Pp. 289–302.

——. [1949c] 1990. "The Why of Human Action." In *Economic Freedom and Intervention: An Anthology of Articles and Essays by Ludwig von Mises*. Bettina Bien Greaves, ed. Irvington-on-Hudson, New York: Foundation for Economic Education. Pp. 51–56.

——. [1950a] 1990. "The Idea of Liberty is Western." In *Money, Method, and the Market Process: Essays by Ludwig von Mises*. Richard M. Ebeling, ed. Norwell, Mass.: Kluwer Academic Publishers. Pp. 303–12.

——. [1950b] [1952] 1980. "Middle-of-the-Road Policy Leads to Socialism." In *Planning for Freedom*. South Holland, Ill.: Libertarian Press. Pp. 18–35.

——. [1952] 1980. *Planning for Freedom*. South Holland, Ill.: Libertarian Press.

——. [1957] 1985. *Theory and History: An Interpretation of Social and Economic Evolution*. Auburn, Ala.: The Ludwig von Mises Institute.

——. [1961] 1990. "On Equality and Inequality." In *Money, Method, and the Market Process: Essays by Ludwig von Mises*. Richard M. Ebeling, ed. Norwell, Mass.: Kluwer Academic Publishers. Pp. 190–201.

——. [1962] 1978. *The Ultimate Foundation of Economic Science: An Essay in Method*. Kansas City: Sheed, Andrews and McMeel.

——. 1966. *Human Action: A Treatise on Economics*. 3rd rev. ed. Chicago: Henry Regnery.

——. [1968] 1990. "The Market and the State." In *Economic Freedom and Intervention: An Anthology of Articles and Essays by Ludwig von Mises*. Bettina Bien Greaves, ed. Irvington-on-Hudson, New York. Pp. 36–39.

——. 1990a. *Economic Freedom and Intervention: An Anthology of Articles and Essays by Ludwig von Mises*. Bettina Bien Greaves, ed. Irvington-on-Hudson, New York: Foundation for Economic Education.

——. 1990b. *Money, Method, and the Market Process: Essays by Ludwig von Mises*. Richard M. Ebeling, ed. Norwell, Mass.: Kluwer.

Narveson, Jan. 1988. *The Libertarian Idea*. Philadelphia: Temple University Press.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Rothbard, Murray N. [1962] 1970. *Man, Economy, and State*. Los Angeles: Nash Publishing.

——. [1970] 1977. *Power and Market*. Kansas City: Sheed, Andrews and McMeel.

——. 1980. "Ludwig von Mises and Natural Law: A Comment on Professor Gonce." *Journal of Libertarian Studies* 4, no. 3 (Summer): 289–97.

——. 1982. *The Ethics of Liberty*. Atlantic Highlands, N.J.: Humanities Press.

Salerno, Joseph T. 1990. "Ludwig von Mises as Social Rationalist." *The Review of Austrian Economics* 4: 26–54.

Shah, Parth. 1988. "On the Ethical Foundation of Public Policy: Utilitarianism, Natural Rights, or Argumentation Ethics?" *Austrian Economics Newsletter* 9, no. 2: 4–9.

Sigmund, Paul E. 1971. *Natural Law in Political Thought*. Cambridge, Mass.: Winthrop Publishers.

Spencer, Herbert. 1970. *Social Statics*. New York: Robert Schalkenbach Foundation.

——. 1978. *Principles of Ethics 2*. Indianapolis: Liberty*Classics*.

——. 1981. *The Man Versus the State*. Indianapolis: Liberty*Classics*.

——. 1989. Letter to J. S. Mill. In *Liberalism: Essays in Political Philosophy*. New York: Routledge. P. 109.

Spooner, Lysander. [1855] 1971. "The Law of Intellectual Property." *The Collected Works of Lysander Spooner*, vol. 3. Weston, Mass.: M & S Press, 1971.

——. [1882] 1971. "Natural Law." *The Collected Works of Lysander Spooner*, vol. 1. Weston, Mass.: M & S Press.

Tabarrok, Alexander. 1990. "Subjective Value Theory: A Reformulation." *Austrian Economics Newsletter* 12, no. 1 (Fall): 5–9.

Thornton, Mark. 1991. *The Economics of Prohibition*. Salt Lake City: University of Utah Press.

Tucker, Jeffrey A. and Llewellyn H. Rockwell. 1991. "The Cultural Thought of Ludwig von Mises." *Journal of Libertarian Studies* 10, no. 1 (Fall): 23–52.

Yeager, Leland B. 1992. "Mises and His Critics on Ethics, Rights and Law." In *The Meaning of Ludwig von Mises: Contributions in Economics, Sociology, Epistemology, and Political Philosophy*. Jeffrey Herbener, ed. Norwell, Mass.: Kluwer. Pp. 190–210.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Impetus for Recognizing Private Property and Adopting Ethical Behavior in a Market Economy: Natural Law, Government Law, or Evolving Self-Interest

Bruce L. Benson*

I. Introduction

Mises (1949, p. 725) convincingly argues that, *given* the existence of the long-run objectives instilled by private property rights, cooperation in the form of division of labor and trade emerge naturally; and therefore, under these circumstances, "there is no need to enforce cooperation by special orders or prohibitions." His explanation is clear: when private property rights are defined and enforced, the

> reason why the market economy can operate without government orders telling everybody precisely what he should do and how he should do it is that it does not ask anybody to deviate from those lines of conduct which best serve his own interests. What integrates the individual's actions into the whole of the social system of production

*Bruce L. Benson is distinquished research professor of economics at Florida State University.

This paper was prepared for consideration for a Ludwig von Mises prize to be awarded at the Mises Institute's 10th anniversary conference, October 9–11, 1992. The paper draws from and expands upon a manuscript entitled "The Evolution of Values and Institutions in a Free Society: The Underpinnings of a Market Economy," prepared for the International Conference on the Unity of Sciences, held in Seoul, Korea in August of 1992. It is also part of an ongoing research project on "The Evolution of Law: Custom Versus Authority" which has been supported by the Earhart Foundation with Fellowship Research Grants for the summers of 1991 and 1992.

The Review of Austrian Economics Vol.6, No. 2 (1993): 43–80
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> is the pursuit of his own purposes. In indulging in his "acquisitiveness" each actor contributes his share to the best possible arrangement of production activities. (Mises 1949, pp. 725–26)

But where do the property rights come from? Some suggest that there is a "natural law," perhaps given by some superhuman power (or by the conscience of wise and decent men) which also has entrusted authority into the hands of enforcement institutions. Another answer, legal positivism in the tradition of Hobbes and Austin, typically identifies law with observed legal institutions: generally the state. This view assumes that without a monopoly in police and/or military power by a coercive centralized authority, anarchy characterized by continual conflict will exist, and that whatever the state defines as law is "law." Thus, the state is the necessary prerequisite to the establishment of the fundamental ethical behavior that supports a free market: Presumably individuals will not respect private property, fulfill obligations, or recognize contracts unless a coercive authority forces them to do so. In fact, legal positivism is closely related to the natural law. As Mises (1985a, p. 11) suggests, "A new type of superstition has got hold of people's minds, the worship of the state."

Mises correctly rejects the natural law doctrine. For example, he (1949, p. 720; also see p. 146; 1985b, pp. 44–49, 82) explains that rules and laws are made by people for specific purposes: there is "no such thing as a perennial standard of what is just and what is unjust. . . . All moral rules and human laws are means for the realization of definite ends. There is no method available for the appreciation of their goodness or badness other than to scrutinize their usefulness for the attainment of the ends chosen and aimed at." In a market economy, the ends are the gains from trade that arise given recognition of private property, and the resulting long-run increases in wealth for those involved. And as Mises says:

> there is nothing inhuman or mystical with regard to the market. The market process is entirely a result of human actions. Every market phenomenon can be traced back to definite choices of the members of the market society. The market process is the adjustment of the market society to the requirements of mutual cooperation. (1949, p. 258)

Mises also rejects parts of the legal positivist view. In fact, he (1985b, pp. 47–48) suggests that "[t]he chief accomplishment of the natural law idea was its rejection of the doctrine (sometimes called legal positivism) according to which the ultimate source of statute law is to be seen in the superior military power of the legislator who

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is in a position to beat into submission all those defying his ordinance. . . . it is an illusion to deny that the best system of laws cannot be put into place unless supported and enforced by military supremacy." There clearly are, in Mises's mind, appropriate and inappropriate laws (e.g., see 1985a, pp. 46–50). For instance, he emphasizes (1985a, p. 58) that "[g]overnments have always looked askance at private property. . . . It is the nature of the man handling the apparatus of compulsion and coercion . . . to strive at subduing all spheres of human life to its immediate influence." And he maintains that one function of the "law" is to constrain the discretionary application of coercive powers by officeholders and bureaucrats (1983, p. 76). Yet, Mises does not take the final step and reject all of tenets of legal positivism. He accepts the view that a state's authority is essential for controlling individual's tendencies toward unethical behavior:

> The state is essentially an apparatus of compulsion and coercion. The characteristic feature of its activities is to compel people to behave otherwise than they would like to behave. . . . With human nature as it is, the state is a necessary and indispensable institution. The state is, if properly administered, the foundation of society, of human cooperation and civilization. (Mises 1985a, pp. 46–47)[1]

Without the state, Mises (1985a, p. 48) expects that anarchy à la Hobbes will prevail. In fact, despite recognizing that the state is always a threat to property rights, Mises (1949, p. 725) maintains that it is also the source of those rights, or at least of their protection: "Beyond the sphere of private property and the market lies the sphere of compulsion and coercion; here are the dams which organized society has built for the protection of private property and the market against violence, malice, and fraud. . . . here are rules discriminating between what is legal and what is illegal, what is permitted and what is prohibited."

The Hobbesian jungle is not the only alternative to the state, however. Indeed, there is another possible source of property rights and behavioral rules, which a direct extension of Mises's analysis of self-interest incentives for cooperation under private property can explain. Thus, the purpose of the following presentation is to extend, to a more fundamental level, the theoretical explanation offered by Mises as to "why the market economy can operate without government orders telling everybody precisely what he should do and how he should do it," by demonstrating that the same reasoning also

[1]Also see Mises (1983, p. 18; 1985a, pp. 48–50), and footnote 13.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

applies to incentives for cooperation in establishing, recognizing, and enforcing private property rights.[2] Given long-run goals rather than short-run concerns, individuals have incentives to enter into cooperative arrangements in order to reduce their costs of defending possession claims and to enhance the property's value by increasing the potential for mutually beneficial interaction, including division of labor and market exchanges. As Rothbard (1970, p. 3) contends, "no State or similar agency contrary to the market is needed to define or allocate property rights. This can and will be done by the use of reason and through market processes themselves; any other allocation or definition would be completely arbitrary and contrary to the principles of the free society." Section II of the following presentation explains why and how self-interested individuals within a particular group will voluntarily adopt the behavioral rules and develop the basic institutional framework that underlies and facilitates a free market, as well as other mutually beneficial interactions. The fact is that even though the concept of a perennial "natural law" is erroneous, "customary law" can evolve naturally or spontaneously, just as Adam Smith described the evolution of markets: "as if guided by an invisible hand." Section III examines the various competitive and cooperative relationships that can arise between groups which facilitate the spread of customary law. It is not contended that the voluntary evolution of the ethical behavioral rules and institutions of customary law *must* arise, however. Rather, the point is that they *can* and *do* arise without a coercive centralized authority. Thus, the concluding section considers the issue of why a centralized coercive authority appears to be the source of law in most modern societies. The fact is that the voluntary rules and

[2]Recognize with Mises (1985a, p. 14), that in order to "understand the present state of political affairs [we] must study history," and note that the literature on legal history reveals a substantial amount of evidence which makes "clear that property and contract were . . . functioning social institutions before state-made laws existed or were even conceived of" (Fuller 1981, p. 174). Many predominantly voluntary arrangements for internal order have been described by anthropologists, historians, and scholars studying modern groups and associations (e.g., see [Hoebel 1954, 1967; Barton 1967; Popisil 1971; Goldsmidt 1951; Peden 1971; Friedman 1979; Berman 1983; Trakman 1983; Umbeck 1981; Berman and Dasser 1990]). Nonetheless, while some economists (e.g., Rothbard [1970]; Friedman [1973]) recognize the logical contradiction between a voluntary, decentralized free market and a centralized, coercive authority for law, an observation made by Leoni (1961, p. 90) still generally applies: The fact is that even Mises and others "who have brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by authorities." Thus, a theoretical presentation using the game-theoretic jargon of "modern" economics seems appropriate.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

institutions are not universally observable because conflicting incentives also exist which are more effectively served by authoritarian institutions and laws. Indeed, the evolution of law in most societies is actually shaped by the ebbs and flows of the natural conflict between customary and authoritarian institutions and norms within and between groups, a conflict that Mises clearly recognizes (1985a, pp. 58, 104, 240). The examination of this conflict emphasizes that the expanding scope of centralized authority does not reflect its superiority in preserving and protecting private property or in facilitating voluntary interactions such as those which characterize a market economy.

II.
The Evolution of Ethics and Law Within a Cohesive Group

As Mises explains, cooperation in a market process generates long-run benefits for everyone (1985b, p. 236), but if some individuals focus on short-run considerations, long-run benefits may not be achieved. The question is, under what circumstances are incentives tied to short-run considerations? In the jargon of game theorists: if every potential market exchange between people involves a discrete, simultaneous one-shot game, then mutually beneficial interaction is unlikely in the absence of some threatened sanction by a coercive power. Short-run concerns dominate potential long-run benefits. While this argument applies to cooperative exchange, it also applies to cooperation in the form of collective recognition and compliance with a set of ethical values. An individual, person *A*, who bears personal costs from adopting some type of conduct that constrains him in some way (e.g., respecting someone's private property rights and therefore not using that property without permission, perhaps involving a payment for the use) will get nothing in return if the other individual, *B*, does not adopt a similar set of values and cooperative behavior (e.g., if *B* does not recognize *A*'s property rights). Uncertainty about the behavior of *B* in the resulting one-shot prisoner's dilemma-type situation induces non-cooperative behavior by *A*, and vice-versa. This prisoner's dilemma scenario does not characterize many kinds of social interactions, however (Tullock 1985). Individual's choices regarding interaction with others are part of a continuous process, with each unique decision representing only one link in a long-time chain of interaction. For example, most businessmen expect to be active for a long time and to be involved in interactions with other businessmen and consumers over and over. Their focus is long run, not short run.

A more appropriate characterization of many interactions might be as multi-contact or repeated games. Indeed, in a repeated game

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

setting with a finite uncertain horizon, cooperation becomes possible (à la Luce and Raiffa [1957] and Axelrod [1984]), although it clearly is not certain.[3] This includes the potential for ethical behavior. For instance, Fuller (1964, pp. 23–24) suggests three conditions which make mutually recognized duties or obligations clear and acceptable to those affected. First, the relationship of reciprocity from which the behavioral obligations arise "must result from a voluntary agreement between the parties immediately affected; they themselves 'create' the duty." Second, the reciprocal acceptance of the duties must be equitable in the sense that both parties must expect to gain: the exchange cannot be one-sided so that one person gains and another loses, once again emphasizing the paramount role of self-interest motives. Third, the parties must expect to interact on a fairly regular basis because the relationship "must in theory and in practice be reversible." That is, given reciprocal gains in a repeated game situation, recognition of common behavioral norms becomes likely as each individual recognizes that the long-term benefits of remaining on good terms with the other party by doing so are likely to be greater than the immediate benefits of not cooperating (e.g., taking another person's possessions, committing fraud).

Even a repeated game involves weaker incentives to recognize a common set of behavioral norms than those which exist in many situations (Tullock 1985). In particular, each individual chooses to enter into several different games with different players. Thus, refusal to behave ethically within one game can affect the person's reputation and limit his ability to enter into other games to the extent that reputation travels from one game to another. When players value ongoing relationships with other reliable players more than the potential benefits associated with refusing to follow accepted behavior in any single game, then the potential for cooperation in the form of recognition of standard behavioral norms is even greater than in simple repeated games (Schmidtz 1991, p. 102). Tullock (1985, p. 1073) refers to this combination of multiple games over time with reputation effects using Adam Smith's phrase: "the discipline of repeated dealings." The incentives to cooperate that arise from repeated games are effectively reinforced, because anyone who chooses a non-cooperative strategy in one game will have difficulty finding a partner for any future game (Tullock 1985, pp. 1075–76). Therefore, in order to maintain a reputation for fair dealings or "high moral standards," each player's dominant strategy is to behave ethically

[3]Actually, the solution still depends on payoffs and other considerations (Tullock 1985, p. 1073).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

throughout each game, whether repeated or one shot. And as a consequence, in Mises's words:

> social cooperation becomes for almost every man the great means for attainment of all ends. An eminently human common interest, the preservation and intensification of social bonds, is substituted for pitiless biological competition . . . Man becomes a social being. . . . Other people become his fellows. . . . For man, until the optimum size of population is reached, it means rather an improvement than a deterioration in his quest for material well-being. (1985b, p. 56)

Property rights under "customary law"

Recognition of private property rights and the rights of individuals (rules against violence, malice and fraud) are likely to constitute the most important of the voluntary and mutually recognized duties or obligations when interactions arise out of reciprocity and reputation (Benson 1989b; 1990).[4] After all, individuals must expect to gain as much or more than the costs they bear from voluntarily constraining their behavior in light of common behavioral norms. Indeed, voluntary adoption of commonly accepted behavior (and participation in the institutions that develop to support those values, as noted below) is likely to arise only when substantial benefits from doing so can be internalized by each individual. Recognition by others of a person's possessions as that person's private property is a very attractive benefit.[5] Therefore, individuals have incentives to reciprocate and recognize other individuals' property rights in order to reduce their own costs of defending possession claims, and to enhance the property's value by increasing the potential for mutually beneficial interaction, including market exchanges. From an individual's perspective, such behavioral norms involve both rights and obligations

[4]It should be emphasized that there is no distinction between criminal and tort law in a customary legal system. However, a large proportion of the offenses which appear in a modern criminal code are still illegal (e.g., see Hoebel [1954, 1967]; Barton [1967]; Benson [1989a, 1990, 1991b, 1992b]; Popisil [1971]; Goldsmidt [1951]; Peden [1971]; Friedman [1979]). Indeed, the primary concern of such a voluntary system is protection of private property, including prevention of theft and violence.

[5]Indeed, private property is a key characteristic of all societies wherein reciprocity and reputation is the primary impetus for recognition of behavioral norms or values (Benson 1990). In such a setting, there does not even appear to be any viable reason for voluntary cooperation that does not involve a relative increase in the degree of privatization of rights to property for the group. Individuals with no existing claims to property might conceivably cooperate in order to take property out of the commons and restrict others' access to it, for example; but the result, if the group is successful, is that access and use rights to the property and claims to the benefits from such use become internalized by the group (i.e., privatized relative to what they were).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

(recognition of other individual's rights), of course. Indeed, "all such relationships entail domination and submission" (Leach, 1977, p. 19). In some cases an individual's rights dominate, but in other cases the individual must submit to the interests of someone else: " 'the law', by which I here mean the customary rules of society, . . . says who must submit to whom and in what context" (Leach 1977, p. 19). The use of "customary rules" is appropriate here. Recognition of property rights becomes a customary obligation. Indeed, even today, as Hayek (1973, pp. 96–97) explains, many issues of law are not "whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities."

Property rights are more a matter of economic value than of legal definition. That is why Mises's (1949, pp. 725–26) arguments about the reasons for cooperation in a market readily extend to explain cooperation in rights formation. The fact that the potential for long-run gains implies that self-interest incentives to cooperate in market activities arise given recognition of private property rights also implies that incentives can exist to cooperate in the establishment of such rights, given that individuals have long-run objectives.

Similar incentives motivate the development of legal institutions; and when a system of behavioral obligations is backed by institutions for resolution of disputes and enforcement of obligations, the result is a legal system (Fuller 1964; Benson 1990). If a legal system develops from the bottom up through voluntary arrangements, as suggested here, it can be referred to as "customary" law (Fuller 1964). A customary legal system is based on individual decisions reflecting individual self-interest, because each individual finds it beneficial to obey certain rules (even though each probably recognizes that these rules may occasionally work to his disadvantage) and to contribute to the costs of enforcement, in anticipation that the long term benefits will exceed the costs.

Institutions for Adjudication and Enforcement of Customary Behavioral Rules

When a group of frequently interacting people is sufficiently small and stable so that reputations are well-known and trust relationships are strong, there is little need for a formal institutional

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

arrangement, perhaps beyond the institution of the immediate family. The self-interest impetus for new institution formation can arise when the potential for beneficial interaction expands to a larger and/or less stable group than one in which everyone knows everyone else's reputations well enough to establish individual trust relationships. As the group expands or becomes more dynamic (e.g., perhaps because of increasing potential for specialization and division of labor), individuals will want to interact with increasing frequency and/or with growing numbers of other individuals with whom reciprocities and reputation effects may not be firmly established. Such interaction, while desirable, also increases the potential for dealings with someone who in fact does not behave as expected, which in turn creates the potential for a disagreement as a result of theft, deliberate fraud, malicious slander, or some other form of taking of property rights. Therefore, for such expansion to occur, each party's commitments to accept commonly expected norms of behavior must be credible.

One way to unilaterally try to insure credible commitments by another party to fairly resolve disputes is "self-help" (Nader and Todd 1978, p. 10): that is, accumulation of human or mechanical assets for inflicting violence in order to threaten retaliation if the other party does not behave as expected. This should reduce the probability of an intentional offense against the individual, and increase the probability that the individual can make a property rights claim stand. However, this can also be quite costly. Furthermore, when the threat of violence is not sufficient and a dispute arises, the relevant institution for dispute resolution is the "feud" or vengeance (Leach 1977, p. 24).

Unilaterally, an individual in a dispute has only two options besides violence. He can simply decide that the cost of pursuing the claim is too high, and drop it, while continuing to interact with the perceived offender, or he can choose not to pursue the claim, *and* to discontinue interactions with the other individual. The relative costs and benefits of these options will be weighed if an individual unilaterally makes a choice; and if the property rights are expected to be more valuable than continuing the relationship, violence will be chosen (Nader and Todd 1978, pp. 10 and 18). Both individuals face similar alternatives, however; so in combination, they actually have a fourth option. They can negotiate a peaceful solution (Nader and Todd 1978, p. 10). In doing so, they attempt to delineate previously undefined property rights or reestablish the rights that have been intentionally taken. Personal strength still plays a role in negotiation, of course, in that it can establish a bargaining advantage. Furthermore, direct negotiation may not be successful, so violence or loses due to acquiescence are still threatened.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The high cost of either unilateral actions in maintaining personal strength or of bearing losses due to acquiescing is an important source of the incentives that individuals with mutual interests in long-term interaction have to form groups or associations for mutual support, even when feuding is still intended to be the ultimate means of dispute resolution. Transactions costs fall through organization and institutions for mutual support. That is, the benefits of negotiation (violence avoidance and maintenance of long-term relationships) are increased. Backing by a combined threat from the group reduces the probability of an intentional offense, reduces the costs for member individuals of large personal investments in the tools of violence, reduces the probability that an individual will have to defend his property relative to what it would be in the absence of such an organization, reduces the likelihood that violence will have to be employed to resolve a dispute, and increases the probability that negotiation will be successful. Furthermore, when negotiation fails, the costs of violent dispute resolution are now shared by the group (e.g., as in a "blood feud"). As feuding begins to create costs for others in the group, incentives arise to offer lower cost means of non-violent dispute resolution than direct negotiation. Indeed, mutual support groups are particularly attractive if group members are obligated to (1) act as or provide access to third parties that mediate or arbitrate any dispute between members, (2) assess judgments to make sure that they are just and consistent with existing property rights, and if necessary, (3) help enforce the dispute's resolution (Benson 1990).[6]

If a dispute between group members arises, for instance, pressure might be brought to bear by the group as a whole (the nature of such pressure is examined below) to induce mediation, leading to a settlement viewed to be "fair" by the group at large. A mediator acts as a disinterested go-between who assists the disputants in their negotiations. This may allow the parties to remain apart, thereby avoiding potentially dangerous direct confrontations. Another low

[6]Note that the mutual support group may have many functions besides its legal role. Primitive kinship groups, for example, might have been primarily concerned with cooperative production of food, shelter, protection from outside threats (or taking of wealth from outsiders, as noted below), and/or religious functions. Even though they also developed a system of customary law to maintain internal order, they may not have fully recognized the importance of this function for facilitating interaction, attributing the results instead to some mystical source. As Mises (1985b, p. 240) notes, "Where people did not know how to seek the relation of cause and effect, they looked for a teleological interpretation. They invented deities and devils to whose purposeful action certain phenomena were ascribed. A god emitted lightning and thunder. Another god, angry about some acts of man, killed the offenders. . ." Also see footnote 8 and related discussion.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

transactions cost alternative may be a mutually acceptable arbitrator, with an agreement by the disputants to accept the arbitrator's decision. As Leach (1977, p. 24) notes, however, "even then, the function of the arbitrator is simply to restore peace; it is not part of his duty to adjudicate about the rights and wrongs of the conflict or to inflict penalties." Given this function, it is not surprising that in primitive or religious societies an arbitrator can be supernatural (Nader and Todd 1978, p. 11): "When both parties agree to perform an ordeal or divination and accept the outcome as a decision, the third party in the arbitration is a nonhuman agent."

Rather than assisting in negotiations, the arbitrator considers the issue and proposes a solution which, *ex ante*, the parties have agreed to abide by (a superhuman arbitrator reveals a decision by the failure of one of the parties to survive the ordeal unharmed). The parties involved must expect the benefits from resolving the dispute peacefully (clarifying rights or, in the case of an intentional offense, reestablishing the old right) to outweigh the cost of resolving the dispute in that manner, or they would not take it to the arbitration (or mediation) system: for instance, if arbitration is perceived to involve more costs than other methods of dispute resolution (e.g., violence, direct negotiation), perhaps because the arbitrator is expected to be arbitrary or biased, then arbitration will not be pursued. Indeed, if one party in the dispute perceives a high cost arising from a peaceful settlement (e.g., because he knows he is guilty), he can still resort to violence. Therefore, the "borderline between law and war" is not fixed (Leach 1977, p. 25), and depending on the individual's perception of relative costs and benefits, any of the resolution mechanisms discussed here (violence, acquiescing, negotiation, mediation, and arbitration) can be observed. Of course, when members of a group are affected by a violent dispute they have strong incentives to raise the cost of violence for group members, *and* to lower the cost of non-violent dispute resolution.

In order to raise the cost of violence, acceptance of non-violent dispute resolution will become a customary obligation that is required for group membership. Customary rights and obligations that induce non-violent dispute resolution can include such things as family loyalty, obligations for past care, honor (or reputation) and the shame that comes with disrupting the social order or invoking the wrath of some supernatural arbitrator. Indeed, resort to violence without first trying to achieve a non-violent solution will result in ostracism by the group. That is, refusal to behave according the accepted rules of conduct, including acceptance of non-violent dispute resolution, can be "punished" by boycott (i.e., exclusion from some or

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

all future interaction with other members of the group). This is possible because customary law is tightly bound with all other aspects of life. Fear of this boycott sanction reinforces the self-interest motives associated with maintenance of reputation and reciprocal arrangements. It also deters intentional offenses. In other words, because each individual has made an investment in establishing himself as part of the community (e.g., establishing a reputation), that investment can be "held hostage" by the community, à la Williamson (1983), in order to insure that the commitment to cooperate is credible.

Furthermore, the costs of non-violent dispute resolution will naturally fall as the institution evolves. After all, since the arbitrator/mediator must be acceptable to both parties in the dispute, "fairness" becomes embodied in the dispute resolution process. As Buchanan emphasizes (1975, p. 68), "Players would not consciously accept the appointment of a referee who was known to be unfair in his enforcement of the rules of the game or at least they would not agree to the same referee in such cases. 'Fairness' or 'justice' may emerge, therefore, in a limited sense from the self-interest of persons who enter into an enforcement contract."

The arbitrator or mediator will have no vested authority to impose a solution on disputants (Leach 1977, p. 24). They are not "adjudicators" backed by coercive power. Under such circumstances, the ruling must be acceptable to the group to which both parties in the dispute belong. An arbitrator or mediator's only real power in such a system is that of persuasion.[7] Indeed, as Fuller (1981, pp. 110–11) explains, "Being unbacked by state power . . . the arbitrator must concern himself directly with the acceptability of his award. He may be at greater pains than a judge to get his facts straight, to state accurately the arguments of the parties, and generally to display in his award a full understanding of the case." This is particularly likely if either: (1) the arbitrator is a specialist who wishes to build a reputation for good decisions in order to maintain or enhance his position in the market for arbitration services, or (2) the arbitrator is a highly reputable member of the community that wishes to maintain that reputation for other reasons. Thus, if the group is large enough so that disputes are not uncommon, certain highly reputable

[7]In this light, Fuller (1981, p. 134) observes that "A serious study of mediation can . . . offset . . . [the assumption] that all social order must be imposed by some kind of 'authority'. When we perceive how a mediator, claiming no 'authority', can help the parties give order and coherence to their relationship we may in the process come to realize. . . . that social order can often arise directly out of the interactions it seems to govern and direct."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

members of the community may be called on to arbitrate disputes so frequently that they can have some formal designation (e.g., elderman, peace chief, consul; see Benson [1989a, 1990, 1992b] and Popisil [1971]). Alternatively, an approved pool of competitive arbitration or mediation specialists might develop (see Hoebel [1954]; Barton [1967]; Benson [1989a, 1990, 1992a]; Berman and Dasser [1990]; and Peden [1971]).

Given that the arbitrator has convinced the individuals in the affected group that a proposed judgment should be accepted, the loser must pay the arbitrated restitution in order to maintain his position within the group; i.e., he buys back his reputation. Because "fairness" is essential for arbitration to arise in a voluntary system, the ruling can also be backed by a threat of ostracism by the members of the entire group (e.g., see Hoebel [1954, 1967]; Barton [1967]; Benson [1989a, 1989b, 1990, 1991a, 1991b, 1992a, 1992b]; Berman and Dasser [1990]; Popisil [1971]; Goldsmidt [1951]; and Trakman [1983]). Thus, decisions can be enforced without backing by a centralized coercive authority.

The nature of the sanction is also likely to vary depending upon the intentions and status of the offender. After all, the members of a group wish to deter costly and potentially violent disputes. Disputes that arise because conditions change in unanticipated ways cannot be effectively deterred, of course; but intentional violation of customary behavioral rules by theft, fraud, or malicious slander can be deterred by explicitly setting a higher payment to buy back the peace. In other words, when an intentional offense occurs, the payment is likely to include both restitution and retribution. Indeed, economic restitution and retribution will be the primary types of punishment in a system of customary law, but they may not be the only types of punishment. After all, "a fine is a [relatively] costless punishment: the cost to the payer is balanced by a benefit to the recipient. It is in this respect superior to punishments such as execution, which imposes cost but no corresponding benefit, or imprisonment, which imposes costs on both the criminal and the taxpayers" (Friedman 1979, p. 408). It is clearly possible, however, that the members of a group may hold that some offenses, perhaps intentional murder or rape, are so heinous that it is impossible to compensate for the harm inflicted. For instance, medieval Icelandic (Friedman 1979) and primitive Kapauka (Popisil 1971) legal systems considered capital punishment appropriate for some crimes. It is also possible that the rest of an offender's life will be committed to working to pay the victim or the victim's family, even if full restitution is never achieved.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Ostracism can also vary in severity depending upon the behavior that it is intended to deter. For some minor offenses or disputes, individuals may face the threat of exclusion from some forms of interaction but not others. The resulting shame or dishonor may be an effective deterrent in these minor cases. In many primitive and religious societies, mythology is invoked, for instance, and the resulting religious ostracism can be a particularly frightening threat. Obligations can be characterized as "taboos" punishable through sorcery and supernatural sanctions, or sins punishable through excommunication. For more severe offenses or disputes, an offender who refuses to participate in non-violent dispute resolution or refuses to accept a fair judgment becomes a social outcast or "outlaw." In fact, "Expulsion from the group is probably the earliest and most effective sanction or 'punishment' which secures conformity, first by mere actual elimination from the group of the individuals who do not conform while later, . . . the feat of expulsion may act as a deterrent" (Hayek 1967, p. 78). As a result of such ostracism, the individual no longer can go to his support group for protection. The plaintiff (or perhaps anyone in the group), therefore, is free to, and perhaps even obliged, to take physical revenge by killing the offender and/or taking the offender's property. Of course, the threat of such violent punishment can be a significant deterrent to illegal behavior. Indeed, similar threats apply in all legal systems, including those that exist today (Umbeck 1981). The fact is, however, that while boycott sanctions are possible, the primary impetus for accepting such rulings is positive self-interest rather than fear of negative consequences. The result can be characterized just as Mises (1949, p. 283) describes the interdependence arising in a free market: "[T]he individual is not bound to obey and to serve the overlord. [Yet] he is certainly not independent. He depends on the other members of society. But this dependence is mutual."

Another characteristic of customary law's sanctions can be predicted in light of its emphasis on individual rights. As with any private property right, the right to restitution will be transferable. An individual might call upon a sub-group (e.g., his immediate family, his religious congregation, his neighborhood) to assist him in prosecuting a strong offender, in exchange for some portion of the settlement, providing the threat necessary to induce that offender to submit to a nonviolent form of dispute resolution (Hoebel 1967; Benson 1991a). Alternatively, a marketable claim for a victim can evolve which can be sold to someone willing to pursue and prosecute the offender (Friedman 1979, p. 414). This, in turn, helps create arrangements under which those who violate the rights of the poor and the weak are pursued and prosecuted. As a customary law system

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

expands and evolves, victims could offer bounties or rewards, but they might simply sell the right to collect a particular fine. Specialized firms (thief-takers, bounty hunters) could arise to pursue criminals and collect restitution; or individuals might contract with firms that attempt to prevent aggression against clients, pay clients who are victimized as insurance companies do, and pursue offenders to recover the insurance payment. Marketable restitution rights increase the probability of pursuit and prosecution, thereby reducing incentives to commit intentional offenses even further.

It does not follow that violence and blood feud will be completely eliminated under customary law. If one party in a dispute perceives the cost of non-violent dispute resolution to be too high, even given the threat of ostracism, a feud may erupt. As emphasized above, institutions and incentives are developed in a customary law system in order to enhance the potential for peaceful interaction and minimize the potential for violence; but no legal system, no matter how threatening, has ever completely eliminated violence. However, in the event of a feud, customary "rules of war" also generally apply; the result can often be described as "a kind of ritual game" (Leach 1977, p. 25). If one party or the other exceeds the customary bounds of the feud, thereby imposing significant costs on others in the group, they are likely to bring down the wrath of the entire community, so feuds tend to be constrained in their scope and duration. Thus, even when violence arises, rights and obligations apply: "there is, in effect, agreement about how to disagree" (Leach 1977, p. 28).

As Mises (1985b, p. 258) emphasizes, "to deal with social groups adequately and completely, one must start from the actions of the individuals," a condition that clearly applies here. In essence, the individuals "exchange inputs in the securing of a commonly shared output," to use Buchanan's and Tullock's words [1962, p. 19]—the output is the order arising under a commonly accepted set of rules which develops into a customary system of law. But as a consequence of this exchange, total resources devoted to the production of credible threats should fall relative to what individuals acting on their own would have to invest, and the potential for interaction expands.

Changing Property Rights and the Development of Contracts in Customary Law

Customary law has been described as an example of natural law. For instance, Leach contends that

> customary law is not viewed as the recent creation of rational men but as something that was laid down by semi-divine ancestral

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> law-givers in remote antiquity. The justification for conforming to custom is not that it makes sense, but that *"that is what our ancestors said we should do"*. . . . There is an implicit social contract with divine ancestors to obey the rules that they laid down. Failure to conform to conservative custom amounts to an act of sacrilege which will automatically bring about supernatural disaster. (Leach 1977, p. 31)

Equating customary law with natural law is very misleading, however. First of all, even if the rules were passed down unchanged from ancestors, those ancestors were rational humans, not gods, and they developed their rules by considering the costs and benefits of doing so. Second, mythology is important in some customary law systems, particularly among primitive societies and religious communities; but it is not relevant in others (e.g., see the discussions of commercial law in Trakman [1983]; Berman [1983]; Berman and Dasser [1990]; Benson [1989b, 1990, 1992a]). Third, the fact that mythology plays an important role in some customary law systems does not mean that the myth *actually* describes the source of the law. In fact, mutually beneficial behavior can often fit a variety of norms.[8] Fourth, and most significantly, customary law is not static. It evolves and changes as individuals adapt to meet the needs of new conditions. The important issues, then, are why did the rules develop in the first place, an issue discussed above, and why do they evolve and change, rather than how those rules happen to be explained in particular customary law systems.

As Demsetz (1967) explains, property rights will be defined when the benefits of doing so cover the costs of defining and enforcing such rights. Potential benefits of clarifying existing or developing new property rights may become evident because a dispute arises, for example, perhaps implying that existing rules do not adequately cover some new situation. The parties involved must expect the benefits from resolving the dispute and of establishing a new rule to

[8]In fact, mythology appears to be a rational development in itself. Taboos against incest are common among primitive societies, for instance. These people do not know why the offspring of incestuous relationships tend to be physically or mentally impaired but through observation, they learn that they are. Thus, in order to avoid the cost of caring for such people they decide that the gods have declared such relationships to be taboo in order to discourage them. In addition, when the costs of obtaining information exceed the benefits, it is very rational to be ignorant; and similarly, when the desired behavioral results can be obtained without incurring all of the costs of informing others of the precise reason for the behavior, then it is rational to do so. Whether the desired behavior arises because an individual is correctly informed by those knowledgeable of such things, so that he expects the economic benefits to exceed the cost of behaving differently, or if he expects a supernatural disaster if he behaves differently, the outcome is the same.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

outweigh the cost of resolving the dispute and enforcing the resulting judgment, or they would not take it to the dispute resolution system. The arbitrator or mediator will often have to make more precise those rules about which differences of opinion exist, and at times even to supply new rules because no generally recognized rules exist to cover a new situation (Hayek 1973, p. 99). A dispute resolution's decision becomes a universally applied rule of customary law only if it is seen as a desirable rule by all affected parties, however (Benson 1990, 1991a, 1992a). It is not coercively imposed on a group by some authority backing the court. Thus, good rules which facilitate interaction tend to be selected over time (e.g., rules that specify or clarify private property rights), while decisions that do not turn out to establish useful rules are ignored.[9] For new rules to be accepted by the members of a group, they generally must be consistent with individuals' expectations, so they must build upon or extend existing values.

Dispute resolution is not the only source of evolving behavioral rules. Individuals may simply observe that others are behaving in a particular way in light of a new situation, and adopt similar behavior themselves, recognizing the benefit of avoiding a confrontation: "It is always an individual who starts a new method of doing things, and then other people imitate his example. Customs . . . have always been inaugurated by individuals and spread through imitation by other people" (Mises 1985b, p. 192). As a consequence of adopting such behavior, the individuals create an obligation to one another to continue the behavioral pattern. A new contract form may develop, for instance, that improves on existing forms by reducing the potential for uncertainty. Others see the benefits of the new contract form and adopt it as well, so it becomes a standard practice in such situations. Fuller (1981, pp. 224–25) explains that "the term *contract law*, therefore, refers primarily not to the law *of* or *about* contracts, but to the 'law' a contract itself brings into existence . . . If we permit ourselves to think of contract law as the 'law' that parties themselves bring into existence by their agreement, the transition

[9]This description of the evolution of customary law may appear to be quite similar to the analysis of common law that has lead several legal theorists to conclude that it produces "efficient" rules (Leoni 1961; Rubin 1977; Priest 1977; Hayek 1973, pp. 94–103). However, there are actually important points of departure. For instance, while much of common law was simply a codification of the basic norms common to Anglo-Saxon society (that is, customary law), common law was also authoritarian royal law, and therefore, even during its earliest development some aspects of it were imposed by authoritarian sources described below (Benson 1990). Footnote 24 contains related discussion.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

from customary law to contract law becomes a very easy one indeed." Customary law and contract law are typically differentiated much more sharply than is suggested here. However, Fuller argues that a sharp distinction is inappropriate:

> if problems arise which are left without verbal solution in the parties' contract these will commonly be resolved by asking what "standard practice" is with respect to the issues in question. In such a case it is difficult to know whether to say that by entering a particular field of practice the parties became subject to a governing body of customary law or to say that they have by tacit agreement incorporated standard practice into the terms of the contract.
>
> The meaning of a contract may not only be determined by the area of practice within which the contract falls but by the interaction of the parties themselves after entering the agreement. . . . The meaning thus attributed to the contract is, obviously, generated through processes that are essentially those that give rise to customary law. . . . [In fact,] a contract [may be implied] entirely on the conduct of the parties; . . . the parties may have conducted themselves toward one another in such a way that one can say that a tacit exchange of promises has taken place. Here the analogy between contract and customary law approaches identity. (1981, p. 176)

The expanding use of contract and development of contractual arrangements is, in fact, a natural event in the evolution of customary law. As customary legal arrangements evolve and are improved upon, they tend to become more formal, and therefore, more contractual. In addition, as inter-group interaction develops and expands so that the trust relationships that characterize intra-group interaction do not apply, conflicts are avoided by explicitly stating the terms of the interaction *a priori*; that is, by contracting. A carefully constructed and enforceable contract can substitute for kinship or some other localized source of trust.

III.
Inter-Group Interaction:
Competition, Emulation, and Cooperation

No single group is likely to develop its norms and institutions in complete isolation from other groups. Indeed, other groups generally exist in close proximity to any particular group (note that the basis for such groups can but need not be geographic proximity; other bases include kinship and religious or functional proximity, as in the "international business community"), and these other groups'

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

legal systems are likely to be developing in a parallel fashion. Thus, inter-group competition, emulation, and cooperation become possible.

Since voluntary associations include both the ability to voluntarily join a group, given the individual is acceptable to the group's existing membership, and the ability to voluntarily withdraw, inter-group movements are a distinct possibility (e.g., see Goldsmidt [1951]; Popisil [1971]; Peden [1977]; Friedman [1979]; Umbeck [1981]; Benson [1989a, 1990, 1991a, 1991b]). Thus, if rules and/or institutions develop in one group which differ from the rules and/or institutions in a parallel group, there will be a tendency for individuals to "migrate" to the group whose law best facilitates voluntary interaction. The coexistence of diverse parallel jurisdictions and legal systems therefore creates incentives to compete to attract or hold membership. But, as a result, existing members of all the various legal systems have incentives to adapt to their own uses many of the legal concepts and institutions of other groups which appear to be beneficial. Through imitation of desirable institutions and behavioral rules developed elsewhere, groups can avoid the potential of lost membership (and reduced beneficial interaction) to other groups; and for that reason, too, there is a tendency for the rules and institutions of each group to achieve the same degree of cohesion and sophistication as is developing in parallel systems. Not all differences need be eliminated, but standardization of many rules and institutions across similarly functioning groups is likely.

The formation of several parallel "localized" mutual support groups can take on even more functions. For example, a member of one group may wish to trade with a member of another group, but the two individuals may not expect to trade frequently so the dominate strategy is one of non-cooperation. After all, repeated-game and reputation effects are localized within a group, and there generally is no potential for a boycott sanction to be applied against someone who is not in the group.[10] It may be that there is considerable potential for mutually-advantageous interaction between the two groups as a whole, however, even though each individual within each group may not anticipate frequent interactions with members of the other group. That is, the groups of individuals as a whole may be in a repeated-game situation with one another, with fairly large potential benefits from cooperation that can be internalized, even though this is not necessarily true of any of the specific individuals in the two groups (at least, before inter-group relationships develop). If

[10]There are possibilities of inter-group boycotts, of course. Consumers as a tacitly organized group might boycott individual producers or producer groups, for instance.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

members of each group recognize the benefits from inter-group interaction, then inter-group legal cooperation may evolve.

Inter-group cooperation is hindered by a significant assurance problem, however. Each individual must feel confident that someone from the other group will not be able to take advantage of him and then escape to the protection of that other group. Thus, some sort of inter-group insurance arrangement becomes desirable, as well as establishment of an apparatus for inter-group dispute resolution. For instance, in order to develop a group's reputation, the membership might bond all members in the sense that they will guarantee payment if a member is judged to be in the wrong in a dispute with someone from the other group. The mutual support group becomes a surety group as well (e.g., see Rothbard [1973]; Peden [1977]; Friedman [1979]; Benson [1990, 1992b]). Membership in a group then serves as a signal of reputable behavior to members of another group, and lack of membership serves as a signal that an individual may not be reputable. Furthermore, if a member of a group cannot or will not pay off a debt to someone from the other group, as established by an acceptable arbitrator, then the debtor's group as a whole will, in order to maintain the benefits of the group's reputation. And as a consequence, the individual for whom the group has had to pay will owe his own group members rather than someone from a separate group. In this way the boycott threat comes into play once again. Members of a group are not going to continue bonding an individual who generates debts to the group's membership but does not pay them off, after all. More significantly, however, because of the large long-term benefits of intra-group interaction, the self-interest incentives to maintain intra-group relationships come into play.

A dispute resolution apparatus is essential for inter-group cooperation to develop. A judgment involving an inter-group dispute will have to be considered to be fair by members of both groups, of course. Therefore, an equal number of individuals representing the group might serve as an arbitration board for disputes between individuals from the two groups (e.g., see Goldsmidt [1951]; Friedman [1979]; and Benson [1990, 1992b]), for example, or a mutually acceptable third party (i.e., an arbitrator or mediator with a reputation for good judgment) might be chosen (as in Barton [1967]; Hoebel [1954]; Peden [1977]; Popisil [1971]; and Benson [1990]). This provides another reason for the tendency toward standardization of customary law across parallel groups with similar functions.

A group whose members insist on strictly imposing their own morality and penalties on outsiders would probably be unable to initiate inter-group trade or other forms of beneficial interaction. And

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

if they were able to begin such activity, they would face continual clashes, followed by boycott sanctions by other groups whose members refuse to visit or trade with them. Indeed, if the benefits of inter-group interaction are substantial, those who hold the norms the group wishes to impose, but relatively weakly, will leave first to join other groups, and others will follow as property values and trade generated incomes decline. Thus, if the membership of a group wishes to simultaneously facilitate inter-group interaction and impose laws that differ substantially from the norm in other groups, its members have strong incentives to inform outsiders of the differences in order to avoid conflict and minimize the difficulty of maintaining non-standard laws. Part of the reciprocal agreements with other groups may be the explicit recognition of differences in laws and procedures for treating conflicts, for example. No group can effectively enforce its rules on outsiders without the support of outsiders. Rules for members of a group may be relatively restrictive, but the rules that apply to outsiders as a result of interaction will have to be moderated if the group is to survive in a free and competitive environment. This in turn implies that as inter-group interactions expand, a hierarchical jurisdictional arrangement may become necessary. For example, each localized group may have jurisdiction over disputes between its members, while disputes between members of a confederation of different groups that interact frequently are settled by some higher confederation level court, and disputes between members of even more dispersed groups from different confederations, such that individuals from the localized groups do not interact frequently but individuals from the two confederations do, may go to an inter-confederation court (e.g., see Popisil [1971] and Benson [1990, 1992b]). Note that these courts are not "higher" courts in the sense that one has some power or authority over others that allows them to overturn lower court decisions upon appeal. Rather, this is a jurisdictional hierarchy that defines the role of each court and allows for increasingly more distant interactions. This allows for differences between the customary law that might be applied within different groups *and* between groups (Popisil 1971). Indeed, Llewellyn and Hoebel (1961, p. 53) point out that the traditional (Western) bias of trying to delineate some all-embracing legal system for a society as a whole can be very misleading: "What is loosely lumped as a custom [from an all-encompassing perspective] can become very suddenly a meaningful thing—one with edges—if the practices in question can be related to a particular grouping." They emphasize that an understanding of customary law requires that groups provide the points of reference rather than some "society" as a whole (1961, p. 28): "there

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

may then be found utterly and radically different bodies of 'law' prevailing among these small units, and generalization concerning what happens in 'the' family or in 'this type of association' made on the society's level will have its dangers. The total picture of law-stuff in any society includes along with the Great Law-stuff of the Whole, the sublaw-stuff or bylaw-stuff of the lesser working units."

There clearly are limits to how extensive an inter-group network of cooperation can be. The limits are not fixed, however. They depend on the relative costs and benefits of information about other groups and their customary legal systems. As economic conditions change the costs and benefits of information can change, so new inter-group relationships may evolve over time. The costs of establishing inter-group legal arrangements depend in part on how "distant" the groups are from one another, where distance can be in terms of geographic space, or in terms of the behavioral norms that are relevant to the groups. While customary groups all tend to emphasize private property, the costs and benefits of establishing the rights and obligations relevant to each group can be quite different, so that different norms are applied. Members of families who join into a larger kinship group, or members of a religious or commercial community with strongly shared values, can easily have most everything go as expected because each individual's expectations about other's obligations are very accurate. Even if disputes arise (and quarreling among members of a family is certainly commonplace) they are very likely to be settled in an amicable way. On the other hand, where individuals in different groups do not share significant values, and therefore, where intra-group behavior is based on substantially different expectations than inter-group behavior must be, inter-group organizations may fail to develop. Individuals who do not interact frequently may base expectations on incorrect or prejudicial views of members of the other group, so mutual incomprehensibility is likely to prevent effective cooperation.

This discussion implies that a customary legal system is, in a sense, flawed, or inefficient. Relative to some perfect ideal, this is certainly the case. However, the ideal against which such a system must be compared in order to draw a conclusion that the system is inefficient, is, in general, unobtainable. Thus, in a realistic sense, the customary legal system is efficient. After all, it results from the interaction of maximizing individuals. Maximizing behavior means that the actions taken are never deliberately wasteful. The actions reflect individuals' weighing of their expected benefits and expected transactions costs, so the perceived gains of a decision always should exceed the perceived costs. Therefore, a decision by individuals in two

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

different groups not to establish cooperative legal arrangements is an efficient decision. Of course, there may be benefits that the individuals do not fully recognize, so there may be some potential benefits from a more extensive legal arrangement that are not internalized, at least in hindsight, but the fact is that uncertainty and expected transactions costs exist that may prevent the formation of an all-encompassing customary legal system. Possibly through coercion a benevolent legal authority could improve on a completely customary legal arrangement then? Friedman answered this question in the following way:

> One cannot simply build any imaginable characteristics into a government; governments have their own internal dynamic. And the internal dynamic of limited governments is something with which we, to our sorrow, have a good deal of practical experience. . . . the logic of limited government is to grow. There are obvious reasons for that in the nature of government, and plenty of evidence. Constitutions provide, at the most, a modest and temporary restraint. As Murray Rothbard is supposed to have said, the idea of a limited government that stays limited is truly Utopian. (1973, pp. 200–1)

In addition, the limit on the potential for inter-group interaction may actually be less significant than it first appears to be. After all, in reality, as Mises explains,

> Man is not the member of one group only and does not appear on the scene of human affairs solely in the role of a member of one definite group. In speaking of social groups it must be remembered that the members of one group are at the same time members of other groups. The conflict of groups is not a conflict between neatly integrated herds of men. It is a conflict between various concerns in the minds of individuals. (1985b, p. 257)

A member of several groups has obligations to other members of each group and they have obligations to him. Thus, he is in fact familiar with the behavioral rules of several different groups and is in a position to facilitate the development of inter-group ties. "Indeed, in any complex society such as ours, there are almost as many distinguishable systems of customary rules and conventions' as there are individuals" (Leach 1977, p. 28), and yet people from many of these different systems interact regularly without having to call upon any dispute resolution process (not to mention, any legal authority). Inter-group cooperation appears to be the norm rather than the exception, and it appears to be quite widespread.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

It should also be noted that an all inclusive legal system has some very undesirable results because it eliminates the potential for competition and emulation. For instance, if a dispute arises with someone else who is also a member of some of the same groups, they might choose among the groups' alternative dispute resolution processes. Indeed, the availability of alternative dispute resolution processes reinforces the tendency of customary law toward fair dispute resolutions. If one forum is biased, a disputant can demand the use of an alternative. A compromise is to use a forum that is fair. As Berman explains,

> The very complexity of a common legal *order* containing diverse legal *systems* contributes to legal sophistication. Which court has jurisdiction? Which law is applicable? How are legal differences to be reconciled? Behind the technical questions lay important political and economic considerations. . . . The pluralism of . . . law, . . . has been, or once was, a source of development, or growth—legal growth as well as political and economic growth. It also has been, or once was, a source of freedom. (1983, p. 10)

Berman includes the "or once was" phrase in recognition of the fact that diverse legal systems are increasingly being subjugated and centralized under the authority of coercive state governments.

IV.
The Conflict Between Custom and Authority

Short-run considerations can dominate under certain circumstances, of course (Mises 1985b, p. 236), and while individuals have strong incentives to cooperate and avoid conflict when they are likely to interact frequently (e.g., when long-run considerations dominate), they have very different incentives when "the discipline of repeated dealings" does not apply (e.g., when short-run gains appear to outweigh long-run benefits). Indeed, when wealth enhancing voluntary interaction is unlikely (or when the gains are not likely to be very large), individuals may have stronger incentives to take wealth away from the others rather than attempt some reciprocal arrangement for mutual satisfaction.[11]

[11]For instance, as Tullock (1985, p. 1079) notes, once a person's reputation is lost, there is virtually no reason to behave cooperatively in the future, because the cost of rebuilding a reputation is extremely high. Therefore, such a person has incentives to become a thief or to "con" people.

Note that wealth or well-being "does not refer only to concerns commonly called egoistic but comprehends everything that appears to an individual as desirable and worthy"; nonetheless, the "fact that most people are eager to get more tangible good is a datum of economic history" (Mises 1985b, pp. 206–7).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The taking of wealth will be resisted, of course, if the potential victim feels that he is strong enough to resist, so violent confrontation is likely, particularly if the potential loser is a member of a support group. After all, one form of mutually beneficial interaction within the groups described above is in cooperative defense against outsiders, since an important internal function of these groups is the protection of private property, and such a taking by an external aggressor is a theft. In order to reduce the cost of such violence, those seeking transfers must amass sufficient strength to coerce compliance.

One way to reduce the potential for resistance to a transfer effort is to employ a "professional army." However, if an individual can persuade others of a like mind to cooperate and share the cost in a taking effort (e.g., by serving in an army or contributing financial support for it) in exchange for a share of the transferred wealth, then that individual lowers his own costs. Thus, there are incentives to develop cooperative mechanisms for taking and transferring wealth. Of course, when some individuals form groups for the purpose of taking from others, then others have incentives to expand their groups which share the cost of protection. Indeed, many of the historical examples of localized support groups whose internal legal arrangements can be characterized by the customary legal system described above, were simultaneously involved in warfare with other groups (e.g., see Popisil (1971); Benson (1989a, 1990, 1991a, 1992b); Hoebel (1954, 1967); and Peden (1971]). In European tribal groups, for example, Kingship initially developed for purposes of warfare (Benson 1990, 1992b). As kingship developed, a centralized hierarchical structure of top-down command also developed since this institutional arrangement proved to be the most effective for the purposes of warfare.[12] During these early developments, however, kings had no law-making or law-enforcing authority.[13]

[12]It does not follow that every kingdom was constantly at war. The competitive process of emulation of successful military institutions, arms built up, and strategic alliances between kingdoms, might maintain relatively equal levels of military power for some time, thereby deterring aggression.

[13]Despite the focus on nation-states and their governments, this theory of authoritarian law is not simply a restatement of the "rent-seeking" or "interest-group" theory of government. Perhaps two points will help to clarify this. First, for reasons explained below, many rules of conduct enforced by governments' legal apparatus are codified custom rather than new rules imposed by some authority. Thus, an examination of any government's law will reveal many aspects which may not fit a transfer theory. Indeed, governments have functions which do not involve internal legal order, some of which may be consistent with a transfer theory (i.e., warfare), but some may not be. Second, as Mises (1985a, p. 47) recognizes, "not every apparatus of compulsion and coercion

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Authoritarian Law

Military conquest means that different groups are forced to become sub-groups within a collective kingdom ("kingship" will be used to describe all such arrangements, and the area over which a military leader exerts authority will be called a "kingdom"). As more sub-groups are subjugated by a single centralized military authority, the potential for taking from one sub-group and transfer to another *within* that Kingdom arises. The evolution of kings' authoritarian roles in internal law making and enforcement (i.e., legislation, adjudication, and law enforcement affecting relationships within the Kingdom as apposed to external relations with other kingdoms), is completely analogous to the development of the external role of Kingship (Benson 1990; 1992b). That is, a legal system emanating from a centralized hierarchical authority, referred to here as "authoritarian law," has as its primary functions the development and use of rules and institutions for taking wealth from some and transferring it to others, and for discrimination among sub-groups on the basis of their relative power in order to determine gainers and losers. Indeed, in Europe, authoritarian legal functions were taken on by the kings' military hierarchy initially, until the increasing demands for

---

is called a state. Only one which is powerful enough to maintain its existence, for some time at least, by its own force is commonly called a state." Historically, powerful entities that were not geographically defined states or kingdoms, such as the medieval Roman Catholic Church, have been able to take property rights from others through the use of authoritarian legal institutions (Berman 1983). Even today, there are other sources of such law. Consider modern organized crime, for example. These organizations establish rules of conduct for members backed by enforcement mechanisms and sanctions. Some of their rules and institutions have evolved over time as customary law, through voluntary interactions of members, but they also use an enforcement apparatus and threat of sanctions to extort payments from individuals who do not want to voluntarily interact with them (e.g., "protection rackets"). Thus, organized crime is like kingship and modern representative governments in that it uses authoritarian institutions to take from some individuals within its sphere of influence for the benefit of those with power. The scope of authoritarian law therefore reaches beyond governments' legal arrangements, and it need not cover every aspect of modern government. Nonetheless, "whatever functions it may assume, the state is always characterized by the compulsion and coercion exercised" (Mises 1985a, p. 47) while non-state entities are not necessarily so characterized.

On a related issue, recall the introductory discussion regarding Mises's view of the necessity of a coercive state. A group ruled by customary law need not constitute a state, as typically conceived. Indeed, it might be appropriate to characterize the institutions and processes of the customary law with Buchanan's term of "ordered anarchy" (1975, p. 180). However, von Mises (1985a, p. 93) argues that "The right and true state . . . is the state in which I or my friends, speaking my language, and sharing my opinions, are supreme. All other states are spurious." Thus, Mises appears to mean that at least some "customary law" group is the appropriate state, although he also rejects the idea of ordered anarchy (1985a, p. 48).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

authoritarian law led to its own specialized bureaucratic hierarchy.

In many nation-states, rule by kingship has been replaced by other sources of authoritarian law, such as elected representative bodies. Nonetheless, "The essential characteristic features of state and government . . . are present both in despotic and in democratic governments" (Mises 1985a, p. 47). Authoritarian law, whether imposed by kings or an elected representative assembly, involves the taking of wealth from relatively weak sub-groups in order to transfer it to relatively powerful sub-groups, or "interest groups" in reflection of the self-interest motives of the decision-making authorities (Benson 1990; 1992b): the distinction is in terms of who gets what, "not in the incentives and motives" (Mises 1985a, p. 5; also see Hayek 1973, p. 3). Authoritarian decision-makers discriminate between competing interest groups on the basis of what they can give to the decision-maker.[14] The self-interest motives of government decision-makers *must* be recognized in the context of an authoritarian transfer process. Kings were clearly not simply impartial transfer mechanisms. They demanded (took) transfers for their own benefit when they felt they had sufficient power, and even when they entered an exchange, thereby transferring to others, the support gained generally enhanced their own wealth and power relative to what it would have been in the absence of the exchange.

Authoritarian Law and Property Rights

The internal taking/transfer mechanisms all involve property rights alterations to benefit some at the expense of others. Taxation is the taking from a resource owner of part of the right to the income derived from productive uses of property (including labor services), for example.[15] Another fairly obvious transfer occurs when property

[14]In competition between national governments, the determinant of wealth transfers is military strength. Military power can be an important discriminatory criterion in determining internal wealth transfers as well. The control of military forces by earls and barons was one of the most important considerations in early development of authoritarian law under the kingship form of government in England (Benson 1990, 1992b), and military power is still a major factor in many non-western countries (e.g., the Philippines, Nicaragua, El Salvador, Lebanon, Iraq, South Africa, Yugoslavia, etc.). The threat and use of military-like terrorism is also an important political factor, and the ability to *threaten* political disruption remains an important political consideration everywhere. Other bases for sub-groups' political power may be economic power, the number of members (perhaps because of the potential for physical force, but also because of the votes it can muster in a representative democracy), and the ability to organize and voice demands in a political arena.

[15]Indeed, under kings, a major purpose of taxes and other authoritarian developments in law was extraction of revenue to support the external function of kingship—wealth transfer through warfare. As Mises (1985a, p. 3) argues: "Foreign policy and

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of some kind is confiscated or someone is forced to sell property for less than its value in a voluntary exchange, and then the property is given to or used for the benefit of others.[16] Other rights modifications simply place limitation on a person's use of his property. For instance, a monopoly franchise simultaneously grants an exclusive right to produce and restricts or attenuates rights to the use of other individuals' resources who might wish to enter that market. All such transfer activities are completely analogous to theft (Tullock 1967).

An important implication of an authoritarian modification in property rights, is that there will be a series of adjustments through time. Some of these changes are predictable. For instance, once sufficiently organized power is exerted to cause decision-makers to make an authoritarian change in a rights assignment, those who would be harmed by the change must either organize and apply counter pressure, or resign themselves to being worse off. The same "prisoners dilemma" arises in this internal political struggle for property rights as arises in the external struggle between governments.[17] Thus, there is a potential for spiralling competition between interest groups much like the spiralling arms build up that typically characterizes inter-governmental competition.[18] As the relative strength of interest groups change, the magnitude and direction of transfers change. Of course, as a new interest group successfully organizes, it does not follow that the original rights modification will be reversed. After all, that would harm the previously organized and already powerful group. Some modification of the earlier change is possible, but a more probable response is that the authority will grant some alternative favorable treatment to compensate the new group for its earlier losses. This change is likely to harm an as yet unorganized group.[19] That group

---

domestic policy are closely linked together; they are but one system; they condition each other."

[16]Property rights transfers can alter the behavior of those directly impacted in ways that benefit other groups as well, so not all beneficiaries need be obvious.

[17]Recall footnote 11, and recognize that once a sub-group establishes a reputation as a political interest group intent on achieving transfers, the probability of that group's becoming an effective part of a cooperative customary law system is very small, because the cost of rebuilding a reputation is extremely high.

[18]This kind of competition implies that resources are "wasted" in the sense that they are used up to "produce" wealth transfers rather than to produce additional wealth.

[19]Often the changes in authoritarian laws and institutions are slow, or marginal, as with customary law, but at times they can be large. Indeed, the competition for authority can turn violent, if the authority attempts to impose a relatively large transfer at the expense of a potential rival for power. Thus, both evolution and revolution shape the development of authoritarian laws (Berman 1983). But a new authority is not likely to radically change the basic institutions of the legal system. After

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

then has relatively strong incentives to organize and seek rights modifications. Competition leads to emulation, of course, and at times competing interest groups might cooperate with one another in an effort to defeat yet another group. The repeated "redistributive game" is often one of coalition formation and splitting (Jasay 1989, pp. 117–21). Thus, demands for authoritarian rights modifications grow over time.[20]

Another series of adjustments arising from an alteration in property rights is also predictable. Legal authorities can never anticipate all of the consequences of their rulings (Hayek 1973, p. 51; Mises 1985b, pp. 195–96, 378). "Yet every action. . . . affects the course of future events" (Mises 1985b, p. 195). After all, property rights provide incentives which condition behavior, so a change in rights changes behavior. The customary legal structures described above emphasized private property and individual rights. Since authoritarian law produces rights transfers, it follows that at least initially, authoritarian legal developments imply restrictions on private property and individual rights (later, interest groups may form which successfully press for reestablishment of certain rights, of course—those who suffer loses tend to press for a return to a previous rights structure (Benson 1990, 1992b). At any rate, it is clear that under authoritarian law, property rights are permanently vulnerable to authoritarian alterations. When rights are significantly altered through authoritarian changes in law, or when they become sufficiently tenuous due to frequent legal changes, individuals' behavior changes. Given a loss of rights, for instance, individuals will quit performing previously worthwhile functions. If the functions are demanded by powerful interest groups, the legal authority will either try to force the previous behavior, or directly produce the functions (Benson 1990, 1992b).[21]

---

all, those institutions developed for the purpose of transferring wealth and they can serve one authority as well as another. As Mises (1983, p. 120) explains, "the handling of the government apparatus of coercion and compulsion, must necessarily be formalistic and bureaucratic. No reform can remove the bureaucratic features . . ."

[20]There are other reasons to expect increasing numbers of rights modifications. Substantial benefits typically must be anticipated for individuals to incur initial organizational costs, but once organized, the costs of demanding more benefits are relatively low. Also, as power increases goals expand.

[21]As English Kings began to develop a role in law enforcement, they began to shift the form of "punishment" from victim restitution to a fine paid to the king. The right to restitution was one important incentive underlying the reciprocal arrangements for protection, insurance, pursuit, and adjudication. The taking of this right meant that reciprocal arrangements began to breakdown, and ultimately, kings had to create a separate hierarchical enforcement apparatus (Benson 1990, 1992b).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Authoritarian Institutions

Authoritarian decision-makers could conceivably respond to growing interest group demands strictly through legislation, and enforce the resulting law personally, but the fact is that a decision-making authority's own time and resources are limited, so increased demands ultimately force delegation of certain responsibilities to lower levels of authority: a bureaucratic system must emerge "in the administrative apparatus of every government the sovereignty of which stretches over a large area" (Mises 1983, p. 15).[22] This is particularly true in the area of policing. After all, "while there is usually little need for external force to uphold the customary law, the authoritarian law . . . needs for its enforcement the prestige and influence or even the intimidation and physical force of the authority and his supporting minority" (Popisil 1971, p. 344).

When authoritarian law applies and a dispute arises, litigants are generally trying to manipulate the existing rights structure. Wealth transfers are the goal of one party in a dispute and avoidance of the transfer is the goal of the other. The dispute might be taken before a third party tribunal to be resolved. Under these circumstances, disputes are negative sum competitions: one party wins, another loses, and both parties incur dispute resolution costs. They are, therefore, much more adversarial in nature than potential positive sum customary law disputes (i.e., clarification of private property rights to generate long-term benefits), and as a result, the authoritarian institution of dispute resolution will be different from the institutions of customary law. Adjudication, in which a judge is backed by coercion (a police force, prison system, executioner, etc.) to force the disputants into court and impose his decision, is generally necessary when negative sum disputes are involved. The authority may actually take on an adjudication role, as English kings did, for instance, (and use military forces to back his rulings) although a judicial (and policing) bureaucracy is certain to arise. As the scope of legal authority expands and property rights attenuations increase, the cost of judicial activities, in terms of time and effort, become too high for the authority.

[22]There are at least two important consequences of such a hierarchy of delegated authority: (1) as these bureaus increase in number and/or size the ability of higher decision-making authorities to monitor their actions decreases, the power of bureaucrats grows relative to the power of those they supervise, and those they originally obtained their authority from (Mises 1983, pp. 54, 80); and (2) as their discretion increases and they grow in size they generally will demand more rights modifications to enforce (Benson 1990), thus resulting in wealth transfers to bureaucrats (i.e., larger budgets and/or more power).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Since authoritarian law transfers wealth from the weak to the powerful, a powerful individual or group often can induce the authority to serve as a representative in the litigation process. Indeed, the legal authority often benefits from the transfer, and while the authority might be in a position to simply take the desired property, there are strong incentives to make "legitimate" the taking by using legal institutions, in order to minimize the potential for a public outcry and organized resistance, and in order to offer the loser a non-violent arena for protest. Therefore, in matters of authoritarian law the authority often takes on the role of prosecutor before his own judicial bureaucracy and then, as legal activities increase, develops a prosecutorial bureaucracy for that purpose. Thus, as dispute settlement becomes one of deciding who gets what in a negative sum transfer process, rather than a clarification of property rights, "the true plaintiff becomes the victim, [and] the state becomes the plaintiff" (Nader and Todd 1978, p. 38). Indeed, so called "victimless crimes" become increasingly likely as powerful groups demand that new "offenses" be defined as criminal because they offend the "morality" or transfer potential of those with power. Clearly, restitution backed by ostracism can no longer be the relevant sanction since the victim is the loser. Therefore, sanctions take on other forms: capital punishment, confiscation of property, fines paid to the authority, and imprisonment.

Of course, given the expected cost of adjudication, as well as the cost of sanctions which can be imposed through coercion, "extrajudicial processes will develop . . . ; so will self-help procedures" (Nader and Todd 1978, p. 38). The expected loser may be willing to negotiate an out-of-court settlement, for instance, or accept a mediator or arbitrator. The impetus for these extrajudicial processes is similar to the impetus under customary law in that they are means of avoiding costs. Under customary law, they are used to avoid the cost of violence, however, while under authoritarian law they are used to avoid the cost of adjudication. As explained below, however, a legal authority has incentives to monopolize the legal system, so arbitration and other sources of non-adjudicated dispute resolution may be discouraged by making it more costly or even "illegal" (e.g., see Trakman [1983]; Benson [1989b, 1990, 1992b]). But if the potential loser perceives the expected cost of avoiding adjudication and of using extrajudicial processes to be greater than the expected cost of "self-help" (i.e., violence against the other party), then that also becomes a viable option. This self-help is no longer constrained by the threat of ostracism. If the physical and/or economic sanctions threatened by the authority are less effective than the threat of ostracism by a customary law group, then violence can increase. As policing bureaucracies

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

are expected to enforce increasing numbers of laws (e.g., such as those against victimless crimes), for instance, the probability of being caught by an imperfect policing system is lowered. Indeed, if scarce policing resources are also increasingly less available to control customary offenses against persons and property, such offenses can also increase, and self-help solutions are likely to follow.[23]

Custom versus authority

Authoritarian law requires a substantial amount of localized monopoly power in order to truly impose law that generate transfers; as Mises (1985a, p. 46) notes, "A state without sovereignty is a contradiction in terms." When people can choose between alternative sources claiming legal authority, for example, then these legal arrangements have to compete for the attention of potential subjects. Thus, the supposed authority really has little authority, since individuals will be able to opt for an alternative legal system whenever there is an attempt to take wealth from them without sufficient compensation. As a result, those who wish to generate wealth transfers by establishing some authoritarian rule will have to claim to be the source of all law, whether that truly is the case or not. Competition leads to emulation, of course, and at times competing legal authorities might cooperate with one another in an effort to defeat yet another rival for authority. The changing tides of cooperation and competition between cannon law of the Roman Church, royal law of developing kingdoms, and feudal law of the manors in medieval Europe were very important in shaping Western legal tradition (Berman 1983). Coalitions do not last, however: ultimately authority requires monopoly.

Authoritarian legal systems, with their centralized power, also attempt to absorb customary legal systems over time, simultaneously adopting many aspects of the customary system and altering others. The reason for this absorption is the same as the reason for competing with alternative claimants to legal authority: an effective authority must be an exclusive legal monopoly in some area. In addition, as Mises explains:

> people have been eager to falsify historical evidence and to misrepresent the course of events. The endeavors to mislead posterity about what really happened and to substitute a fabrication for a

[23]Police resources have been shifted to control drug crimes, for example, and property crime has been less effectively deterred so property crime has risen significantly (Benson et al. 1992).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> faithful recording. . . . were often prompted by the [falsifiers'] desire to justify their own . . . actions from the point of view of the moral code of those whose support or at least neutrality they were eager to win. (1985b, pp. 291–92)

Thus, Hayek (1973, p. 126) suggests that as "the enforcement of law [became] regarded as the primary task of government, it was natural that all the rules which governed its activities came to be called by the same name [law]. This tendency was probably assisted by a desire of governments to confer on its [authoritarian] rules of organization the same dignity and respect the [customary] law enjoyed." Furthermore, beneficiaries of the authoritarian transfer process support and encourage this falsification and absorption effort of the authoritarian decision-making institution.

In this regard, Kings claimed exclusive "divine rights" as they attempted to impose legal authority. Authoritarian law also evolves "naturally" from the self-interested behavior of individuals, after all, so it is not surprising to find the concept of natural law being invoked to support authoritarian legal arrangements, just as similar myths are evoked to explain naturally evolving customary law. Indeed, while mythology is often seen as a characteristic of customary law, it may play a more significant role in authoritarian law. Legal positivism is, in fact, a convenient "myth" for those who want to assert the control of a nation's authoritarian legal system.

The myth of legal positivism is clearly revealed when law and justice are equated, as they often are by the backers of a centralized legal system. Centralized authority has increasingly claimed to be the only source of law, but as MacCallum notes, the result is that

> There is in the public sector of our society . . . an organization of force which in collecting its necessary revenues and carrying out its operations contrasts sharply with the proprietary norms. Western society suffers a schizophrenia in the public field whereby the same agency that provides wanted public services also performs such public dis-services in the course of its operations and acts so irresponsibly in other ways as to be cannibalizing the society from which it springs. Its system of coercions and its irregular administration of rules deter, demoralize, and drain the resources of those engaged in economic tasks. Consequently the very word *government* has ambiguous connotations. In one breath it calls to mind an image of benign public service, and in the next, a threat to the continued existence of the community. (1964–65, p. 58)

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The apparent "schizophrenia" in government arises because of the conflict between the rules and institutions of custom and authority (or "property and sovereignty"). Yet, so pervasive are the processes of authoritarian absorption of law that Fuller suggests that (also see Mises 1983, p. 4):

> the tendency is to convert every form of social order into an exercise of the authority of the state . . . Legislation, adjudication, and administrative direction, instead of being perceived as distinctive interactional processes, are all seen as unidirectional exercises of state power. Contract is perceived, not as a source of "law" or social ordering in itself, but as something that derives its whole significance from the fact that the courts of the state stand ready to enforce it. (Fuller 1981, pp. 156–57)

Customary rules and institutions which are relatively efficient evolve to replace those which are less efficient. Since authoritarian law often evolves to replace or at least absorb and build upon customary rules and institutions, some observers might contend that the authoritarian system must be more effective. While it is true that "everything that happens is the necessary sequel of the preceding state of things" (Mises 1985b, p. 77), it also follows that the legal institutions which evolve to facilitate involuntary transfers will be quite different from those which characterized the customary law systems detailed above. It is quite conceivable that authoritarian legal institutions which are relatively ineffective will be replaced by more effective institutions through a similar process to that which characterizes the evolution of customary law and its accompanying institutions. The evolutionary processes themselves need not be different, however, for outcomes to be quite different. Mises (1983, p. 52) notes "Government efficiency and industrial efficiency are entirely different things," and in the same fashion, while customary and authoritarian legal institutions could be equally effective at facilitating their purposes, those purposes are different.[24] As Mises (1985b,

[24]Leoni (1961, p. 17) notes that authoritarian legislation may deliberately or accidentally disrupt homogeneity by destroying established rules and by nullifying existing conventions and agreements that have hitherto been voluntarily accepted and kept. Even more disruptive is the fact that the very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements. On the other hand, the continual change of rules brought about by inflated legislation prevents it from replacing successfully and enduringly the set of nonlegislative rules (usages, conventions, agreements) that happen to be destroyed in the process.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

pp. 48–49) emphasizes, one of the primary underpinnings of the natural law doctrine is valid: "the idea that every . . . law of a country was open to critical examination by reason." The problem with the advocates of the doctrine of natural law is that they fail to recognize what the appropriate standard of comparison is. The standard is not some set of pre-ordained natural laws, but rather, it "must be found in the effects produced by a law" (Mises 1985b, p. 49). Law can facilitate voluntary interaction or involuntary transfers; clearly this is a standard of comparison. Indeed, Mises (1985b, p. 54) maintains that the "ultimate yardstick of justice is conduciveness to the preservation of social cooperation."

Given the undesirable consequences of authoritarian law for large numbers of individuals, it is not surprising to find that in no case has the power of the authority become absolute (Leach 1977; Mises 1985b, p. 374). In fact, in some cases, the rise of authoritarian law has been successfully resisted to a substantial degree. Resistance to legal authority is likely to be most effective where the benefits generated through voluntary interaction are vary large and/or the relevant group interacts across the jurisdictions of different authorities so that inter-jurisdictional competition occurs. Thus, the international merchant community of medieval Western Europe is one such example (Trakman 1983; Berman 1983; Benson 1989b, 1990, 1992a), and it was from the resulting system of values and customary law that modern commercial law, the backbone of international trade, emerged. Indeed, modern international commercial law which evolved from this medieval legal system, remains as a largely voluntarily produced and enforced system of customary law, despite many attempts by various coercive governments to subjugate it over the centuries (Trakman 1983; Berman and Dasser 1990; Benson 1989b, 1990, 1992a).

Many other groups which started with customary law systems did not achieve a market order, however. The fact is that at some point

---

Recall that Leoni and others (see footnote 9) view judge made law to be fundamentally different from legislation. A sharp distinction is inappropriate, however (Benson 1990). When a coercive authority's judges set a precedent, the resulting rule becomes enforceable law for *everyone* in the society whether it is a mutually beneficial law or not. And like authoritarian legislation, authoritarian precedent can make major alterations in law without the consent of all parties affected. Thus, as Mises (1983, p. 16) suggests, common law has also failed to resist the arbitrariness of centralized, bureaucratic management of legal affairs. The resulting uncertainty about the longevity of rights is a significant source of allocative inefficiency. In contrast, under customary law, an inefficient dispute settlement might arise, but if other parties recognize this the settlement does not become a universal rule of customary law. This suggests that efficient rules are relatively more likely to evolve in customary law than in authoritarian law, including judge made law.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

many of these evolutionary processes have been interrupted by coercive forces, either from internal or external power bases, before a market order was able to emerge. The interruption can be abrupt, as through military conquest, or gradual, as through a gradual breakdown in the incentives to voluntarily interact for mutual gain (and the resulting breakdown of these incentives' accompanying norms and institutions), as authoritarian institutions expand their scope. The evolution of rules and institutions is an ongoing process, however, characterized by a continuing conflict between custom (voluntary arrangements) and authority. In some cases custom dominates and the authoritarian powers of government are limited or even diminished, as during the "liberal" era of much of the nineteenth century in the United States, Britain, and some parts of Europe (and apparently today in parts of Eastern Europe). But the fact is that "government becomes liberal only when forced to by the citizens" (Mises 1985a, p. 58). When citizen resistance is not strong enough, authority expands its scope, as it has in most of the world during most of the twentieth century. Indeed, a combination of custom and authority virtually always exists in any legal system. However, just as Mises (1985a, p. 241) convincingly argues that "It is a delusion to believe that planning and free enterprise can be reconciled," it is similarly true that authoritarian government's control of the legal apparatus is incompatible with the establishment of the freedom that arises under customary law. The objectives that underlay these two different sources of law are inconsistent, so no stable "equilibrium" relationship between the two will ever arise.

References

Axelrod, Robert. 1984. *The Evolution of Cooperation*. New York: Basic Books.

Barton, R. F. 1967. "Procedure Among the Ifugao." In *Law and Warfare*, Paul Bohannan, ed. Garden City, N.Y.: The Natural History Press.

Benson, Bruce L. 1989a. "Enforcement of Private Property Rights in Primitive Societies: Law Without Government." *Journal of Libertarian Studies* 9: 1–26.

——. 1989b. "The Spontaneous Evolution of Commercial Law." *Southern Economic Journal* 55: 644–61.

——. 1990. *The Enterprise of Law: Justice Without the State*. San Francisco: Pacific Research Institute.

——. 1991a. "An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary American Indian Law." *Review of Austrian Economics* 5, no. 1: 65–89.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

——— . 1991b. "Reciprocal Exchange as the Basis for Recognition of Law: Examples from American History." *Journal of Libertarian Studies* 10: 53–82.

——— . 1992a. "Customary Law as a Social Contract: International Commercial Law." *Constitutional Political Economy* 2: 1–27.

——— . 1992b. "The Development of Criminal Law and Its Enforcement: Public Interest or Political Transfers." *Journal des Economistes et des Etudes Humaines* 3: 79–108.

——— . 1992. Iljoong Kim, David W. Rasmussen and Thomas W. Zuehlke. "Is Property Crime Caused by Drug Use or Drug Enforcement Policy?" *Applied Economics* 24: 679–92.

Berman, Harold J. 1983. *Law and Revolution: The Formation of Western Legal Tradition*. Cambridge, Mass.: Harvard University Press.

Berman, Harold J., and Felix J. Dasser. 1990. "The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy." In *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*. Thomas E. Carbonneau, ed. Dobbs Ferry, N.Y.: Transnational Juris Publications.

Buchanan, James M. 1975. *The Limits of Liberty*. Chicago: University of Chicago Press.

Buchanan, James M. and Gordon Tullock. 1962. *The Calculus of Consent*. Ann Arbor: University of Michigan Press.

Demsetz, Harold. 1967. "Toward a Theory of Property Rights." *American Economic Review* 57: 347–59.

Friedman, David. 1973. *The Machinery of Freedom: Guide to Radical Capitalism*. New York: Harper and Row.

——— . 1979. "Private Creation and Enforcement of Law: A Historical Case." *Journal of Legal Studies* 8: 399–415.

Fuller, Lon. 1964. *The Morality of Law*. New Haven: Yale University Press.

——— . 1981. *The Principles of Social Order*. Durham, N.C.: Duke University Press.

Goldsmidt, Walter. 1951. "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge." *American Anthropologist* 53: 506–24.

Hayek, F. A. 1973. *Law, Legislation, and Liberty*, Vol. 1. Chicago: University of Chicago Press.

Hoebel, E. Adamson. 1954. *The Law of Primitive Man*. Cambridge, Mass.: Harvard University Press.

——— . 1967. "Law-Ways of the Comanche Indians." In *Law and Warfare*, Paul Bohannan, ed. Garden City, N.Y.: The Natural History Press.

Jasay, Anthony de. 1989. *Social Contract Theory: A Study of the Public Goods Problem*. Oxford, England: Clarendon Press.

Leach, Edmund. 1977. *Custom, Law, and Terrorist Violence*. Edinburgh: The University Press.

Leoni, Bruno. 1961. *Freedom and the Law*. Los Angeles: Nash Publishing.

Llewellyn, Karl N. and Adamson E. Hoebel. 1961. *The Cheyenne Way*. Norman, University of Oklahoma Press.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Luce, Duncan R. and Howard Raiffa. 1957. *Games and Decisions*. New York: Wiley Publishing.

MacCallum, Spencer. 1964–1965. "The Social Nature of Ownership." *Modern Age* 9: 49–61.

Mises, Ludwig von. 1949. *Human Action: A Treatise on Economics*. 3rd rev. ed. Chicago: Contemporary Books.

——— . 1983. *Bureaucracy*. Grove City, Penn.: Center for Futures Education.

——— . 1985a. *Omnipotent Government: The Rise of the Total State and Total War*. Spring Mills, Penn.: Libertarian Press.

——— . 1985b. *Theory and History: An Interpretation of Social and Economic Evolution*. Auburn, Ala.: Ludwig von Mises Institute.

Nader, Laura and Harry F. Todd, Jr., eds. 1978. *The Disputing Process: Law in Ten Societies*. New York: Columbia University Press.

Peden, Joseph R. 1971. "Property Rights in Celtic Irish Law." *Journal of Libertarian Studies* 1: 81–95.

Popisil, Leopold. 1971. *Anthropology of Law: A Comparative Theory*. New York: Harper and Row.

Priest, George L. 1977. "The Common Law Process and the Selection of Efficient Rules." *Journal of Legal Studies* 50: 65–82.

Rothbard, Murray N. 1970. *Power and Market: Government and the Economy*. Kansas City: Sheed Andrews and McMeel.

——— . 1973. *For a New Liberty*. New York: MacMillan.

Rubin, Paul H. 1977. "Why is the Common Law Efficient?" *Journal of Legal Studies* 6: 51–64.

Schmidtz, David. 1991. *The Limits of Government: An Essay on the Public Goods Argument*. Boulder, Colo.: Westview Press.

Trakman, Leon E. 1983. *The Law Merchant: The Evolution of Commercial Law*. Littleton, Colo.: Fred B. Rotham.

Tullock, Gordon. 1967. "The Welfare Costs of Tariffs, Monopolies and Theft." *Western Economic Journal* 5: 224–32.

——— . 1985. "Adam Smith and the Prisoners' Dilemma." *Quarterly Journal of Economics* 100: 1073–81.

Umbeck, John. 1981. *A Theory of Property Rights With Application to the California Gold Rush*. Ames, Iowa: Iowa State University Press.

Williamson, Oliver E. 1983. "Credible Commitments: Using Hostages to Support Exchange." *American Economic Review* 83: 519–40.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Protectionist Roots of Antitrust

Donald J. Boudreaux and Thomas J. DiLorenzo*

I. Introduction

Economists and legal scholars have studied the effects of antitrust policy for decades, but it is only within the past several years that the origins of antitrust have received much scholarly attention. In *The Origin of the Sherman Act* (1985) George Stigler was among the first to reexamine "the problem of why the United States introduced an affirmative competition policy." He tested an agrarian interest hypothesis—that "the Republicans passed the Sherman Act to head off the agrarian . . . movements" for price controls and other interventions—against a self-interest hypothesis that small businesses wanted a law to protect them from their larger, more efficient rivals. He found little, if any, empirical support for either hypothesis.

DiLorenzo (1985) examined the origins of the Sherman Act from a public choice or interest-group perspective and provided evidence that industries accused of being monopolized in the late 1880s were in fact dropping prices and expanding output faster than the rest of the economy. The Sherman Act might have been a political smokescreen to pave the way for the McKinley tariff, which was passed just four months after the Sherman Act and was sponsored in the U.S. Senate by Senator John Sherman himself.

In an early analysis of the origins of antitrust, Robert Bork (1966) claimed to have found evidence in the *Congressional Record* that the

*Donald J. Boudreaux is associate professor of economics and legal studies at Clemson University. Thomas J. DiLorenzo is professor of economics in the Sellinger School of Business and Management at Loyola College in Baltimore.

The Review of Austrian Economics Vol.6, No. 2 (1993): 81–96
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"legislative intent" of Congress in passing the Sherman Act was consumer protection.

The public interest interpretation of the origins of antitrust—that the law was passed as a benevolent response by Congress to a form of market failure—is by far the predominant view among economists and legal scholars. This viewpoint is so widely believed that attempts to explore the alternative, self-interest hypothesis are sometimes met with indignation and dismissed out of hand. For example, when Robert Bradley recently (1990, p. 737) explored the self-interest hypothesis he was chastised by a referee for his "cynical explanation of the passage of the Sherman Act, a view not shared by most contemporary economists." Similar statements were once made about law and economics, public choice, and many other out-of-the-mainstream research programs.

Despite the predominance of the public-interest view of the origins of antitrust, there are reasons to be skeptical of this view. This paper reexamines the genuine roots of antitrust—the state-level antitrust laws that were enacted several years prior to the 1890 Sherman Act. In the mid 1880s, strong political movements emerged at the state level of government in favor of "anti-monopoly" legislation that eventually took the form of antitrust statutes. Although some analysts, such as Stigler (1985) and Thorelli (1955), have noted the existence of these state statutes, no one to our knowledge has thoroughly investigated the possible relation between these movements and the Sherman Act.

The Sherman Act was not enacted in a Washington, D.C. political vacuum. It emanated from the same economic and political forces that gave rise to state antitrust legislation. It is particularly relevant that in 1890 state legislatures still directly elected U.S. Senators, and that the Sherman Act was introduced in the U.S. Senate, not the House.

Section II discusses the economic and political forces at work during the emergence of state antitrust legislation in the late-nineteenth century by focussing on one state, Missouri, which was representative of the states that enacted antitrust legislation during this period. With the exception of Maine, all states that enacted antitrust statutes in 1889 were located in or near the Mississippi valley (see appendix table 1). Section III contains a summary.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

II.
Interest-Group Politics and the Missouri Antitrust Law

Close study of late nineteenth-century politics in Missouri suggest that farmers there were a major special interest behind state antitrust legislation. There is evidence that farmers did indeed view large-scale enterprise as a competitive threat and sought antitrust laws to protect them from competition.

The Missouri Farm Lobby

The "Farmer's Alliance" was the most powerful political coalition in Missouri in the years preceding the enactment of the 1889 antitrust law. Democrats affiliated with the Alliance dominated the 1888 state elections. The Democrats were very farm conscious. There were farmer-lawyers, farmer-bankers, farmer-teachers, farmer-preachers, farmer-editors, and farmer-druggists. The Alliance confronted candidates for the state legislature with a card containing the following pledge: "I pledge myself to work and vote for the [Farmer's Alliance's] demands irrespective of party caucus or action" (Drew 1891, p. 303). The pledge card was widely distributed to farmers who were instructed: "If any candidate refuses to sign . . . vote against him and use your influence to elect those who sign, irrespective of party."

Of the 174 state senators and representatives, 140 signed the pledge, as did all of the congressmen-elect headed for Washington and the winners of all three statewide races in that year.

Antitrust and the Missouri Farm Lobby

One reason Missouri farmers wanted an antitrust law was that many of them were being *under*priced by larger, more-efficient farms. The Farmer's Alliance repeatedly warned of the dangers of "the land concentrating in the hands of capitalists" (Clevenger 1940, chap. VI). For example, at a 1889 meeting of the National Farmers Alliance in St. Louis, a Declaration was issued that first urged "care for the widows and . . . orphans," and then called for legislation to "suppress . . . all unhealthy rivalry" (Drew 1891, p. 786). Farmers were bitter about the low and falling agricultural prices, and they blamed the trusts for the decline in their economic position. They complained of "our depressed condition" because of the fact that "the price of the farmers' grain is below the cost of production." As David D. March wrote in his *History of Missouri* (1971, p. 1169), "Just as the low price of raw cotton spurred the expansion of the Southern Alliance, so low grain prices in the late 1880s caused thousands of farmers in the wheat belt . . . to join the National Farmer's Alliance."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

To the extent that agricultural prices were falling, the notion that the Missouri antitrust law enhanced consumer welfare is suspect. Missouri farmers were an appropriate special-interest group to launch an antitrust policy on grounds of self-interest if it could be expected that an "antitrust" statute would be enforced and interpreted as an anti-*bigness* statute to protect some producers from the competition of larger and more-efficient rivals.

III. Missouri Agriculture in the Late-Nineteenth Century: Monopoly or Competition?

If the consumer-welfare interpretation of antitrust legislation explains Missouri's experience with such laws, the following trends should be evident in the economic data on Missouri's agricultural sector for the 1870s and 1880s: (1) the real price of farm outputs should have been rising (or not falling); (2) the volume of farm outputs should have been falling (or not rising); and/or (3) the real price of farm inputs should have been rising.

However, if the real prices of farm outputs and inputs fell—and if the volume of output rose—the protests against supposed monopolization are inconsistent with what was actually happening in Missouri's agricultural economy. Indeed, if real prices decreased and outputs increased, the cries against monopolization are more plausibly interpreted as rent-seeking attempts of less-efficient producers to protect their markets from the increasing competition of more-efficient producers.

During the 1880s, cattle was Missouri's single largest agricultural output in terms of percentage of the state's agricultural gross output (Klepper 1978, p. 320). In 1889, nearly one-quarter of all agricultural output in Missouri was cattle production. Hog production was a close second, accounting for more than 20 percent of Missouri's agricultural gross product. Wheat was the state's third-largest agricultural product, representing more than 13 percent of Missouri's agricultural gross product in 1889. Cattle, hogs, and wheat together account for almost 60 percent of Missouri's total agricultural production in 1889.[1] Appendix table 2 shows the market value of Missouri-raised cattle and hogs per head from 1879 through 1891, as well as the price of wheat in Missouri for these years.

[1]Missouri was the fourth largest cattle-producing state in the United States (behind Texas, Iowa, and Kansas), the nation's third largest hog-producing state (behind, Iowa and Illinois), and the nation's fifth largest wheat producer (behind California, Illinois, Indiana, and Ohio). See *Abstract of the Eleventh Census: 1890*, U.S. Bureau of the Census (Washington, D.C.: U.S. Government Printing Office, 1896), Table 4 and Table 7.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Cattle

Although a simple comparison of, say, the 1879 per-head value of Missouri cattle with the 1889 value shows a slight increase, a different and more significant picture emerges by examining the trend of cattle values from the mid 1880s to the end of the decade. Compared to the peak value in 1884, the per-head value of cattle in Missouri in 1889 was 28.8 percent lower (and it was to fall even further by 1890). Looked at another way, the average value of cattle per head for the years 1887–89 was 18.8 percent less than was the average value per head for the years 1882–84. This decline in cattle values—which affected all the major cattle-producing states—was accompanied by a steady increase during the 1880s of the quantity of cattle entering into the gross national product. Measured in pounds of live weight, cattle supply during the 1880s increased by about 50 percent for the United States as a whole, while the price per hundredweight received by cattlemen in the United States fell from an average of $5.69 in 1880 to $3.86 in 1890–a 15 percent decrease.

This increased supply and reduced price of cattle resulted in *lower* prices of beef (and beef by products) for final consumers. According to economic historian Mary Yeager (1981, p. 70), the average price of beef tenderloins in the United States fell nearly 38 percent between 1883 and 1889.

Hogs

As with cattle, the market value of hogs in Missouri peaked in the early-to-mid 1880s. The 1889 value of a Missouri-raised hog was approximately 19 percent lower than it was six years earlier. The average value of hogs in the state for the 1887–89 period was more than 15 percent lower than it was in 1882–84.

The nationwide output of hogs and hog products increased during the 1880s while the price per hundredweight of hogs fell precipitously—from $6.07 in 1880 to $3.60 in 1890—a decrease of more than 40 percent.[2]

Wheat

The trend of prices for Missouri wheat was also downward during the 1880s, although as in much of the midwest during the late nineteenth century, wheat prices in Missouri fluctuated a good deal.[3]

[2]The 1870 price per hundredweight of hogs in the United States was, at $6.80, even higher than it was in 1880.

[3]McGuire (1981) ranked 14 states according to the extent of variability from year-to-year in their wheat prices. Missouri is ranked eighth.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The 1889 price of wheat in Missouri was 34.7 percent lower than it was a decade earlier. The average price of wheat in Missouri during the 1882–84 period was 97 cents per bushel as compared to 72 per cents per bushel on average for the 1887–89 years. The latter price is almost 27 percent lower than the price of wheat earlier in the 1880s.

These data do not support the notion that Missouri agriculture was becoming monopolized during the 1880s. Moreover, it is doubtful that "predatory pricing" was taking place, for prices fell for the entire decade (and, indeed, since 1870). Predatory pricing for that length of time would be irrational.

Farm-input costs

The farm input that first comes to mind as possibly having been monopolized in the late nineteenth century is transportation by railroad. Although rail rates did fluctuate over time[4]—and varied from region to region and from shipper to shipper—there is broad agreement among economic historians that railroad rates fell dramatically during the several decades following the Civil War (North 1966, pp. 139–40). According to Stigler: "[a]verage railroad freight charges per ton mile had fallen by 1887 to 54 percent of the 1873 level, with all lines in both the eastern and western regions showing similar declines" (1885, p. 2). Henry Varnum Poor found that railroad rates fell from an average charge per ton-mile of $2.90 in 1865 to $0.63 in 1885—a rate decrease of over 78 percent.[5]

Consistent with the significant railroad-rate reduction was the equally significant increase in the quantity of rail services during the latter part of the nineteenth century. According to Poor, total ton-miles carried by U.S. railroads increased by 700 percent between 1865 and 1885 (Hilton 1966, p. 89). In Missouri, there were 4,234 miles of railroad track in 1880; by 1889 this figure increased by almost 45 percent to 6,118 miles of track (Clevenger 1940).[6] No evidence that we know of exists to support the belief that railroad rates were monopolistically high during the period leading up to the passage of antitrust legislation in Missouri.[7] All evidence points in the opposite direction.

[4]Stanley Lebergott (1984, pp. 284–85) argues that the variability of rail rates during the late nineteenth century was an effect of keen competition among the railroads.

[5]Poor, quoted in Hilton (1966), pp. 89–90.

[6]Clevenger (1940) reports that in 1879 Missouri had 27 counties without railroad service, but by 1891 only 11 counties remained unserviced by the railroads.

[7]In fact, the intensity of the competition among the railroads, and the resulting continual downward trend in rail rates in the decades following the Civil War, is considered to be the reason underlying the passage of the 1887 Act to Regulate Interstate

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Nor is the evidence consistent with the farmers' contention that financing costs increased during the late nineteenth century. In fact, real interest rates fell dramatically during the 1880s. In the midwest region of the country, defined to include Missouri, real interest rates on farm mortgages fell from an average of 11.41 percent in 1880 to 7.84 percent in 1889. This fall represents a 31 percent reduction in real interest rates during the 1880s.[8]

As for the prices of farm machinery, we were unable to find specific data on farm-machinery prices in Missouri. However, Clevenger reports that, although the 1880s was a period of falling input, output, and consumer-goods prices in Missouri, downward adjustments in farm-output prices usually occurred before downward adjustments in the prices of consumer goods. But, the decreases in the prices o/f farm outputs in Missouri was generally *preceded* by decreases in the prices of farm inputs. "In terms of bushels of wheat, oats, or corn, a mowing machine, binder, or cultivator could be bought for less in 1892 than in 1882" in Missouri (Clevenger 1940, p. 46).

Clevenger's claim that the price of farm inputs in Missouri decreased in real terms during the 1880s is consistent with the trends in farm-machinery prices for the United States as a whole during the latter part of the nineteenth century. This trend was downward during the decades following the Civil War. Towne and Rasmussen (1960) constructed an index of U.S. farm-machinery prices (in constant 1910–14 dollars) and found that this index fell from 251 in 1870 to 124 in 1880 and to 101 by 1890. This index shows that farm machinery was 2.5 times more costly in 1870 than it was in 1890.[9] There is no reason to believe that the trend of farm-machinery prices in Missouri differed significantly from the nationwide trend.

Missouri's economy was undoubtedly becoming more and more commercialized and competitive in the post-Civil War era. The rapid economic growth of Missouri's economy and its increasing integration with other states is reflected in the number of railroad carloads of general merchandise unloaded or loaded in St. Louis. In 1870, 20,542 cars were unloaded or loaded. By 1880 this figure had nearly quadrupled to 125,939, and by 1890 this figure had more than doubled again to 323,506 (Thelen 1986, p. 32). These data question the

---

Commerce. Sponsors of this Act hoped that the Interstate Commerce Commission would effectively cartelize the railroads. See, e.g., Kolko (1963), MacAvoy (1965), and Hilton (1966).

[8]Jeffrey G. Williamson (1974, p. 153).

[9]This index fell to 94 by 1900.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

contention that the Missouri economy was falling into the consumer welfare-reducing grips of monopolists.[10]

In short, available data on the economic factors pertaining to Missouri's agricultural sector in the decades leading up to the enactment of the 1889 antitrust statute contain no clear evidence of monopolization. Indeed, every sector of Missouri's economy—especially its agricultural sector—shows signs of being highly competitive during the last three decades of the nineteenth century.

What, then, did the agrarians in Missouri have to gain from the passage of an antitrust statute? Agrarians and local merchants in Missouri (as elsewhere) correctly perceived that the larger producers were responsible for the downward pressures on the prices of their outputs (Thelen 1986). Because economies of scale caused a decrease in the optimal number of producers of any particular commodity, the economy *looked* as if it were becoming more "monopolized." As such, in their attempts to protect their local markets from the lower-priced and/or higher-quality goods being shipped to towns and countrysides on the railroads from the increasingly centralized production locations, politically-organized agrarians complained of the evils of "monopoly." But "monopoly," as used by the agrarians, referred only to the larger and more efficient firms who were driving many small farmers and merchants out of their traditional lines of work and business.[11]

Our interpretation of anti-monopoly sentiment in Missouri as being rooted in local-producer opposition to the more intense competitive pressures resulting from "big" firms and the growing commercialization of Missouri's economy is more consistent with the data presented above than is the public-interest interpretation.[12]

[10]Thelen, a historian who is sympathetic with populist ideals and goals, reports that "[r]ailroads transformed the size and shape of [Missouri's] market economy, forcing businessmen and farmers to produce at unprecedented rates to survive the new competition" (p. 32).

[11]Our interpretation of the anti-monopoly protests of the late nineteenth century is, of course, not novel. For example, Dudden, argues that "in the United States by the middle of the nineteenth century, monopoly was generally deplored as *hampering opportunity*. . . . [T]he anti-monopoly spirit of the Guilded Age took shape as a widespread but essentially middle-class protest against the *centralizing* tendencies in transportation, land tenure, business, and industry, which characterized the period" (1957, p. 588; emphasis added).

[12]For further evidence in support of our interpretation of the political motivation behind antitrust legislation in the case of Missouri in particular, see Clevenger (1940), Piott (1985) and Thelen (1986). Dudden (1957), Wiebe (1967), Mayhew (1972), and McDonald (1974) are only a handful of the historians who interpret nineteenth century agrarian political protests—including the agrarians' ubiquitous calls for antimonopoly legislation—as an attempt to stave off the increasing commercialization of their occupations and lives.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

However, a more complete understanding of the specific forces at work in Missouri in the late 1880s requires a discussion of the livestock and meat-packing industry. Producers in this industry played a key role in the passage of Missouri's 1889 antitrust statute.

IV.
Cattlemen, Butchers, and Other Rent Seekers

The agrarian interest group that seems to have exerted the greatest pressure for passage of Missouri's 1889 antitrust statute was comprised of cattlemen and local retail butchers who were agitated over the allegedly monopolistic practices of the "beef trust"—the centralized butchering and meat-packing firms that emerged in Chicago in the early 1880s as a result of the development of an economical refrigerated railroad car. The four largest Chicago meat packers during the 1880s were Swift, Armour, Morris, and Hammond, collectively known as "the Big Four."

Although Gustavus Swift was not the first entrepreneur to ship slaughtered cattle by refrigerated railroad car, he was the first to do so economically, shipping his first refrigerated car full of beef from Chicago to Massachusetts in the fall of 1877. The "refrigeration" of this 1877 shipment of dressed beef was little more than open doors on a railroad car being hauled in cold weather. However, Swift saw profits in being able to slaughter meat in a centralized location served by several railroads (i.e., Chicago) and shipping it out year round to cities and towns across the country. The successful development of an economically viable refrigerated car allowed Swift to begin year-round shipments of dressed meats in 1879 (Clemens 1923, pp. 235–36).

In addition to integrating forward into wholesaling and retailing, Swift and his rival Chicago meat packers created markets for beef and hog by-products that had never before existed, thus extracting more profit from each cow or pig slaughtered than was being extracted by local butchers. When this less wasteful use of the whole cow or pig is combined with the great economies of scale that were made possible by the centralization of butchering and shipping, it is not surprising that the price of meats to consumers fell throughout the 1880s (Yeager 1981, p. 70).

The average quality of beef also improved during the 1880s. This quality improvement is closely connected with the fall in the price of cattle that occurred from the mid 1880s through the early 1890s. The fall in cattle prices, in turn, was responsible for the decline of the range-cattle industry beginning in the mid 1880s.

In the wake of the decline of the range-cattle industry there emerged, for the first time in the midwest and the west, rumors of a

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

"beef trust." Range-cattle producers, whose product—live grass fed cattle shipped by rail to wholesale or retail butchers or sold directly to butchers in nearby towns—simply could not compete with the much less expensive and higher-quality dressed meats shipped from Chicago. Cattlemen contended that "the Big Four" meat packers were conspiring to *depress* the price of range cattle (Yeager 1981, pp. 172–73).

In May 1886 the "National Butchers' Protective Association of the United States of America" was formed in St. Louis. The goal of this organization of butchers "was to destroy the dressed meat industry, which was shipping meat from Chicago to eastern cities and selling it for less than the meat killed by local butchers" (Clemens 1923, p. 243).

The complaints of the range-cattle producers and of the local butchers prompted the first investigation of the meat-packing industry by the U.S. Congress (Clemens 1923, p. 479). Responding to these complaints, the Senate in May 1888 appointed a commission to investigate the cause for the *low* price of cattle seemingly spawned by "the Big Four."

Senator George Vest of Missouri was appointed to chair this committee.[13] From its inception to the delivery of its final report in May 1890, the Vest Committee—comprised of five midwestern and western Senators (from Illinois, Kansas, Missouri, Nebraska, and Texas)—sympathized strongly with its cattle-raising constituents. The Vest Committee concluded in its final report that "the principle cause of the *depression* in the prices paid to the cattle raiser and of the remarkable fact that the cost of beef to the consumer has not decreased *in proportion*, comes from the artificial and abnormal centralization of markets, and the absolute control by a few operators thereby made possible" (Senate Report No. 829 [commonly referred to as the Vest Report], p. vii).

The Vest Committee did not deny that the price of beef to consumers had fallen, only that this price did not fall "in proportion" to the reduction in the price of range cattle. Consumer welfare is increased, of course, when the price of a consumer good falls—especially when the quality of the good rises simultaneously—regardless of whether the price of an input fell by more or less than in proportion to the reduction of the price that the consumer must pay for the good.

The Vest Committee found no evidence of collusion by the major Chicago meat packers. Instead, the Committee *inferred* the existence

[13]The Vest Committee began its hearing in St. Louis in November of 1888, "this place being chosen because the International Cattle Range Association and the Butchers' National Protective Association were in session there" (Clemens 1923, p. 749).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of collusive action among the major packers in the buying of cattle from the fact that cattle prices fell during the mid and late 1880s. The Vest Committee reported that "Mr. P. D. Armour testifies at Washington that no such [collusive] agreement existed between himself and other packers *and we do not contradict this statement*. . . . [However] it is difficult to believe that with the most apparent motive for such action the same parties, or their subordinates with their knowledge, do not avail themselves of the opportunity presented by the centralization of markets to combine for the purpose of lowering the price of cattle" (Vest Report, p. 6; emphasis added).

Several state legislatures also attempted to take action against the "beef trust." Late in 1888, Governor Lyman Humphrey of Kansas called on the governments of the states in the Mississippi valley region to send delegates to a conference for the purpose of framing statutes that could be passed by all states in the region.[14] The ultimate goal of this conference of state legislators was uniform state statutes designed to "protect the stock-grower and farmer against the manipulations of such alleged [beef] trust."[15] It eventually adopted a model antitrust statute to meet this goal. There was no mention during the convention or in the proposed statute of the need to protect consumers from high prices; only to protect stockgrowers and farmers from lower-priced competitors.

The model antitrust statute declared all "trusts" to be in violation of the state corporate charter. Significantly, this model antitrust statute included in its definition of a trust the ability of "a combination of capital, skill or acts by two or more persons, firms, corporations or association of persons. . . . [t]o limit or reduce the production, or increase or *reduce* the price of merchandise or commodities" (emphasis added).[16] The statute that was eventually enacted in Missouri was entitled "An Act for the punishment of pools, trusts and conspiracies." It passed by a vote of 98 to 1 in the House, and by 27 to 4 in the Senate.[17]

Missouri's legislation prohibited "restraints of trade" in the form of pooling, forming trust companies, interlocking directorates, and so

[14]Piott (1985, p. 26).

[15]*Journal of the Senate of Missouri*, 35th General Assembly, 1889, p. 165. The entire text of this joint resolution of the Kansas Senate and House calling for a conference of midwestern state legislators, as well as Missouri Governor Francis's message to the Missouri General Assembly, can be obtained from the authors upon request.

[16]Ibid., p. 407. On the prevalent nineteenth century view that the proper and legal means for controlling the size and manufacturing activities of corporations was the state corporate charter, see McCurdy (1979).

[17]*Journal of the House of Missouri*, 35th General Assembly, 1889, pp. 952–53, and *Journal of the Senate of Missouri*, 35th General Assembly, 1889, pp. 410–11.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

on, the effects of which were "to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold" in Missouri.

This statute also prohibited actions intended "to *limit* or fix the price" of outputs (emphasis added).[18] Although the wording of the proscription against actions intended to "limit" the price of outputs is subject to interpretation, one plausible meaning of the verb "to limit" as it is used in this statute is "to reduce" or "to keep from rising." This interpretation of the statute as prohibiting actions intended to reduce prices is consistent with (1) the downward trend of prices in Missouri during the 1870s and 1880s; and (2) the support given by Missouri's Governor Francis and by Missouri's farmer-dominated General Assembly to the St. Louis beef-trust conference of March 1889 in light of the fact that this conference adopted a model antitrust statute that explicitly prohibited price reductions.

Our interpretation of the political events in Missouri during the winter and spring of 1889 is that Missouri's agrarian-dominated General Assembly passed antitrust legislation in 1889 as part of an attempt to shield politically powerful producer groups—especially range-cattle producers and independent retail butchers—from the intense competitive pressures being exerted by the centralized, vertically integrated meat-packing firms headquartered in Chicago. (Recall that cattle was Missouri's single largest agricultural output during the 1880s.) No evidence exists to suggest that consumers in Missouri (or anywhere else in the United States) were harmed by the so-called beef trust. In fact, as shown above, the evidence suggests just the opposite: The centralization of meat packing generated substantial benefits to consumers in the form of lower prices and higher quality meat, as well as greatly expanded use of meat by-products which, until the 1880s, were discarded as waste. However, the growth of the centralized meat packers did result in lower prices for range-cattle producers and, of course, for independent local butchers whose services ran head to head in competition with the services being performed more efficiently in the Chicago slaughtering and packing houses.

III.
Conclusions

The political and economic roots of antitrust are at the state level of government. Numerous states passed antitrust laws before the 1890

[18] *Laws of Missouri*, 35th General Assembly, 1889 (Jefferson City, Missouri, 1889), pp. 96–97; emphasis added.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Sherman Act, itself initiated in the U.S. Senate which, at that time, was directly elected by state legislatures.

The political impetus for some kind of antitrust law came from the farm lobbies of mostly midwestern, agricultural states, such as Missouri. Rural cattlemen and butchers were especially eager to have statutes enacted that would thwart competition from the newly centralized meat processing facilities in Chicago. The evidence on price and output in these industries, moreover, does not support the conjecture that these industries suffered from a monopoly in the late nineteenth century, if monopoly is understood in the conventional neoclassical way as an organization of industry which tends to restrict output and raise prices. These industries were fiercely competitive because of relatively free entry and rapid technological advances such as refrigeration.

As Armentano (1982) has shown, for over a century the antitrust laws have routinely been used to thwart competition by providing a vehicle for uncompetitive businesses to sue their competitors for cutting prices, innovating new products and processes, and expanding output. This paper has argued that, moreover, antitrust was a protectionist institution from the very beginning; there never was a "golden age of antitrust" besieged by rampant cartelization, as the standard account of the origins of antitrust attests.

References

Abstract of the Eleventh Census: 1890. 1896. U.S. Bureau of the Census. Washington, D.C.: U. S. Government Printing Office.

Armentano, Dominick. 1982. *Antitrust and Monopoly: Anatomy of a Policy Failure*. New York: Wiley.

Bradley, Robert L., Jr. 1990. "On the Origins of the Sherman Antitrust Act." *Cato Journal* (Winter): 737–42.

Bork, Robert. 1966. "Legislative Intent and the Policy of the Sherman Act." *Journal of Law and Economics* (October): 15–56.

Clemens, Rudolf A. 1923. *The American Livestock and Meat Industry*. New York: The Ronald Press.

Clevenger, Homer. 1940. *Agrarian Politics in Missouri, 1880–1896*. Unpublished Ph.D. Dissertation. University of Missouri.

DiLorenzo, Thomas J. 1985. "The Origins of Antitrust: An Interest-Group Perspective." *International Review of Law and Economics* 5, no. 6: 73–90.

Dudden, Arthur P. 1957. "Men Against Monopoly: The Prelude to Trust-Busting." *Journal of the History of Ideas* 18 (October): 586–93.

Drew, Frank M. 1891. "The Present Farmers' Movement." *Political Science Quarterly* 6.

Hilton, George W. 1966. "The Consistency of the Interstate Commerce Act." *Journal of Law and Economics* 9 (April): 87–113.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Journal of the House of Missouri. 1889. 35th General Assembly. Jefferson City, Missouri.

Journal of the Senate of Missouri. 1889. 35th General Assembly. Jefferson City, Missouri.

Laws of Missouri. 1889. 35th General Assembly. Jefferson City, Missouri.

Klepper, Robert. 1978. *The Economic Bases for Agrarian Protest Movements in the United States, 1870–1900*. New York: Arno Press.

Kolko, Gabriel. 1963. *The Triumph of Conservatism*. New York: The Free Press.

Lebergott, Stanley. 1984. *The Americans: An Economic Record*. New York: W. W. Norton.

MacAvoy, Paul W. 1965. *The Economic Effects of Regulation*. Cambridge: MIT Press.

March, David. 1971. *History of Missouri*. Columbia: University of Missouri Press.

Mayhew, Anne. 1972. "A Reappraisal of the Causes of Farm Protest in the United States, 1870–1900." *Journal of Economic History* 32 (June): 464–75.

McCurdy, Charles W. 1979. "The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903." *Business History Review* 53 (Autumn): 304–42.

McDonald, Forrest. 1974. *The Phaeton Ride: The Crisis of American Success*. Garden City, N. J.: Doubleday.

McGuire, Robert A. 1981. "Economic Causes of Late-Nineteenth Century Agrarian Unrest: New Evidence." *Journal of Economic History* 41 (December): 835–52.

North, Douglass C. 1966. *Growth and Welfare in the American Past*. New Jersey: Prentice-Hall.

Piott, Steven L. 1985. *The Anti-Monopoly Persuasion: Popular Resistance to the Rise of Big Business in the Midwest*. Westport, Conn.: Greenwood Press.

Senate Report No. 829 from the Select Committee on the Transportation and Sale of Meat Products. 1890. Report to Accompany S3717, 3718, 3719 and Senate Joint Resolution 78. 51st Congress, 1st Session, Serial Set 2705. Washington, D.C.: U. S Government Printing Office.

Stigler, George J. 1985. "The Origin of the Sherman Act." *Journal of Legal Studies* 14 (January): 1–11.

Thelen, David. 1986. *Paths of Resistance*. New York: Oxford University Press.

Thorelli, Hans. 1955. *Federal Antitrust Policy*. Baltimore, Maryland: Johns Hopkins University Press.

Towne, Marvin E. and Wayne D. Rasmussen. 1960. "Farm Gross Product and Gross Investment in the 19th Century." In National Bureau of Economic Research, *Trends in the American Economy*. Pp. 255–315.

Wiebe, Robert H. 1967. *The Search for Order, 1877–1920*. New York: Hill & Wang.

Williamson, Jeffrey G. 1974. *Late Nineteenth-Century American Development*. New York: Cambridge University Press.

Yeager, Mary. 1981. *Competition and Regulation: The Development of Oligopoly in the Meat Packing Industry*. Greenwich, Conn.: JAI Press.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Appendix Table 1
State Antitrust Laws by Date of Passage

State	Year of Passage
Maryland	1867
Tennessee	1870
Arkansas	1876
Texas	1876
Georgia	1877
Indiana	1889
Iowa	1889
Kansas	1889
Maine	1889
Michigan	1889
Missouri	1889
Montana	1889
Nebraska	1889
North Carolina	1889
North Dakota	1889
South Dakota	1889
Washington	1889
Kentucky	1890
Louisiana	1890
Mississippi	1890
Alabama	1891
Illinois	1891
Minnesota	1891
California	1893

Source: George Stigler, "The Origin of the Sherman Act," *Journal of Legal Studies* 14 (January 1985): 1–11.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Appendix Table 2
Prices of Missouri's Three Leading Agricultural Products, 1879–1891

	Cattle (per head)	Hogs (per head)	Wheat (per bushel)
1879	$22.95	4.36	1.01
1880	$25.06	5.59	0.89
1881	$27.03	6.29	1.19
1882	$29.01	7.68	0.85
1883	$31.18	7.99	0.88
1884	$32.61	6.75	0.62
1885	$31.05	5.75	0.77
1886	$28.60	5.44	0.63
1887	$26.49	5.83	0.62
1888	$25.65	6.71	0.88
1889	$23.22	6.48	0.64
1890	$21.86	5.44	0.83
1891	$21.92	5.40	0.80

Source: Robert Klepper, *The Economic Bases for Agrarian Protest Movements in the United States, 1870–1900*. New York: Arno Press, 1978.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Review Essays

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Toward a Deconstruction of Utility and Welfare Economics

David Gordon*

Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective. By Roy E. Cordato. Boston: Kluwer Academic Publishers, 1992.

Roy Cordato's ambitious and well-organized book addresses a central problem in economics. Standard neoclassical analysis finds fault with the unhampered free market, on a ground that Austrian economists resolutely reject. People's activities in a free market, it is claimed, may impose benefits or harms on others in a way that their decisions on production fail accurately to reflect. Some economists (the "Pigouvians") look to government to remedy these inefficiencies, termed "externalities." Others, the "Coaseans," call for much less intervention, but they too accept the underlying analysis.

Cordato, firmly in the Austrian camp, begins with a summary of the reasons Austrians dissent from the neoclassical view of externalities. His aims go far beyond this, however; he presents an alternative Austrian conception of efficiency, which he calls "catallactic efficiency."

Cordato starts with a short account of the neo-classical position and at once proceeds to the Austrian critique of that view. As he rightly notes "[t]he optimal solution [of the standard approach] is given by the price and output that is obtained under conditions that would exist in a perfectly competitive general equilibrium (PCGE) . . . This result is shown to be Pareto optimal, i.e., no one can be made better off without making someone else worse off, and social efficiency is maximized. Externalities result in a deviation from the standard" (p. 2).[1]

*David Gordon is a senior fellow with the Ludwig von Mises Institute.

[1]On p. 2, line 10, "pecuniary" should read "non-pecuniary."

The Review of Austrian Economics Vol. 6, No. 2 (1993): 99–112
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Much of Cordato's criticism of this position follows familiar lines. As he notes, constantly changing conditions rule out the use of a static PCGE as a welfare ideal (pp. 4–5). Further, no central authority could gather together the immense body of data required to calculate the PCGE solution (p. 8). But in the course of his comments, Cordato makes an astonishing statement: "In order to implement Pareto optimality as a welfare criteria [sic], an analyst must make both interpersonal and intertemporal comparisons of utility" (p. 6).

This is an elementary error. As Cordato has himself noted, a situation in which an externality is present is not Pareto optimal. If so, a Pareto superior move may be made: since this, by definition, makes no one worse off, no interpersonal comparison of utility is required.

Perhaps Cordato has been misled on the issue by the fact that Pigou himself accepted interpersonal utility comparisons, at least for practical purposes. He believed, e.g., that "it is evident that any transference of wealth from a relatively rich man to a relatively poor man of similar temperament, since it enables more intense wants to be satisfied at the expense of less intense wants, must increase the aggregate sum of satisfaction."[2] Were Cordato commenting on this, he would of course be right to object. But Pigouvian subsidies and taxes, despite their name, involve no interpersonal utility comparisons.

Or have I interpreted Cordato uncharitably? His statement begins, "In order to *implement* Pareto optimality . . ." (p. 6, emphasis added.) His claim may be, then, not that the theoretical model requires interpersonal comparisons, but rather that the attempt to put the model into practice does so. But if this is his meaning, it is once more unclear why he holds it. Or does he in fact adopt a yet more attenuated view? Perhaps by "interpersonal comparison" all he intends is that implementation of the model requires that people's utility functions be known to the policymaker. This, however, is not what the expression "interpersonal comparison of utility" normally means. I hope that on a future occasion Professor Cordato will clarify his unusual remarks.

An argument that Cordato takes over from O'Driscoll and Rizzo also seems to be incorrect. "With respect to externalities, in order for the standard tax or subsidy solution to work, the analyst must have better information concerning market conditions than is actually

[2]A. C. Pigou, *The Economics of Welfare*. 4th ed. (London: Macmillan, 1932), p. 89.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

being generated in the markets themselves. If this were possible, the actual markets, and in particular the exchange relationships that comprise them, would not be needed" (p. 3).

I entirely agree that no planner can acquire the requisite information, but why need the market to be superfluous if someone could discover all the optimal conditions? What if the optimal conditions can be put into practice only through a market, regardless of whether someone knows them through other means? If so, the market is still needed and O'Driscoll's and Rizzo's argument fails. To make their case, they must show that if the optimal conditions were known, they could be put into practice without a market.

After disposing of the standard view, Cordato next summarizes the Austrian approach to externalities. He very usefully contrasts the position of Mises and Rothbard, on the one hand, with that of Hayek on the other. Mises and Rothbard distinguish sharply between positive and negative externalities. The former (Mises's Type 1 externalities) presents no problem at all: since these authors do not adopt the PCGE as a welfare standard, it is irrelevant to them whether these externalities are generated in an "optimal" amount. Negative externalities (Mises's Type 2) are a problem only if property rights have not been exactly defined. Given a precise delineation of property rights, no external standard may properly be used to challenge the outcome of the free market.

Cordato's discussion of Mises's and Rothbard's views on externalities is largely accurate and well put, but he is badly amiss on one issue. He correctly notes that Mises displays more sympathy than Rothbard for patents (p. 21), but he unaccountably suggests that Rothbard opposes copyright as well. "From his [Rothbard's] perspective, intellectual property rights cannot be derived from principles of natural law and therefore the state has no moral 'right' to impose these through the institution of patent and copyright laws" (p. 22; see also p. 80).

In support of his claim, Cordato quotes a passage from Rothbard condemning patents. Why does Cordato feel free to extend Rothbard's criticism, on Rothbard's behalf, to copyright? Perhaps Cordato assumes that patents and copyrights must be dealt with identically; if Rothbard denounces patents, his remarks apply equally to copyright.

Rothbard's actual position, many times expressed, differs entirely from Cordato's summary of it. Rothbard states: "Yet this bracketing of patents and copyrights is wholly fallacious; the two are completely different in relation to the free market . . . On the free market, there would therefore be no such thing as patents. There would, however,

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

be copyright for every inventor or creator who made use of it, and this copyright would be *perpetual* . . ."[3]

Although most economists group Hayek and Mises together, Cordato rightly points out that they differ on externalities. Hayek did not adopt Mises's position but instead adhered to the "standard" view of both positive and negative externalities.

Hayek's position is not to Cordato's liking, and he endeavors to show that Hayek's adoption of it leads him to self-contradiction. Cordato locates a passage from Hayek critical of welfare economics and pounces on the apparent incongruity. "On the one hand he rejects the welfare standard used in neoclassical externalities analysis but embraces much of the analysis that is derived from it. His assessment of welfare economics leaves little room for the policy prescriptions that he suggests are appropriate" (p. 25).

Cordato's criticism of Hayek misfires, since it rests on the mistake already discussed. In the passage Cordato cites, Hayek criticizes "the whole of the so-called 'welfare economics', which pretends to base its arguments on the interpersonal comparisons of ascertainable utilities . . ." (p. 29). Hayek contradicts himself only if the standard analysis of externalities involves interpersonal comparisons of utility. It is Cordato, not Hayek, who errs in thinking that it does.

Hayek's target becomes ever clearer if one looks at his remarks just before the passage Cordato quotes: "The childish attempts to provide a basis for 'just' action by measuring the relative utilities or satisfaction of different persons simply cannot be taken seriously. . . . But most economists seem to begin to see that the whole of the so-called 'welfare economics' . . . [here follows the passage Cordato quotes, as cited in the preceding paragraph]."[4] Since most economists do *not* reject the standard analysis of externalities, it is apparent that Hayek's attack is directed elsewhere.

Cordato now prepares the way for his principal task, the construction of an Austrian welfare standard. He does so by an assessment of two earlier proposals of an Austrian standard, one by Murray Rothbard and the other by Israel Kirzner.

Rothbard's proposal has the virtue of simplicity. Economists in his view cannot exceed the bounds of demonstrated preference when they analyze choices on the market. An economist cannot legitimately

[3]Murray N. Rothbard, *Man, Economy, and State* (Princeton: D. Van Nostrand, 1962) II, pp. 653, 656.

[4]F. A. Hayek, *Law, Legislation, and Liberty*; vol. 3: *The Political Order of a Free People* (London: Routledge and Kegan Paul, 1979), p. 201.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

speak of hypothetical preferences—what people would have chosen in situations other than the actual world; the assessment of choice apart from action depends upon conjectures inadmissible into praxeology. Given this restriction, the welfare criterion at once follows. People who engage in an exchange in the free market do so because they expect to benefit. Every free exchange, then, increases utility *ex ante*—and this is all the economist may properly identify as a rise in social welfare: "the rest is silence."

Cordato rejects Rothbard's short and sure treatment of welfare economics. "Rothbard's conclusions concerning welfare and social utility can be taken to task on several crucial points" (p. 41). First, "Rothbard does not allow for any consideration of harm that is not demonstrated, i.e., psychic harm. The welfare effects of envy, trauma, etc. are ruled out of his model" (pp. 42–43). Contrary to Rothbard's view, one cannot avoid interpersonal comparisons of utility when one assesses social utility. The effects of an exchange cannot be confined to the exchangers: one needs to ask how others benefit or lose, a fact Rothbard himself seems elsewhere to recognize.

"But there are even more damaging criticisms to be made of Rothbard's approach" (p. 43). Cost, as Austrians conceive of it, is subjective: the cost of an action is the highest ranking alternative foregone. "By definition costs cannot be demonstrated. Therefore, in Rothbard's model only benefits, that is, utility gains, are recognized." Further, Rothbard errs by considering only *ex ante* utility. People often regret the choices they have made: "Rothbard's welfare economics . . . ignores the fact that preferences are expressed sequentially through time, as part of a general set of goal oriented activities" (p. 43).

Cordato's final verdict on Rothbard's criterion is a severe one: "Rothbard's welfare economics does not offer much promise as a general guide for externalities theory or policy" (p. 44). Before moving with our author to the Kirznerian climes he finds more congenial, let us pause to evaluate Cordato's assault.

Cordato's misses completely the point of Rothbard's article. The piece in question, a veritable *tour de force*, attempts to overturn the conclusions of mainstream welfare economics. In the standard view, economists can neither make interpersonal comparisons of utility nor introduce controversial normative premises into their analyses. Given these restrictions, many practitioners of welfare economics still endeavor to find imperfections in the free market. Rothbard convincingly shows that these attempts end in failure. This, however, does not entail the collapse of welfare economics: given the restrictions under

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

which economic science operates, one can arrive at a welfare economics that supports the free market.

Crucial to understanding the article is, to reiterate, a simple point. Rothbard is offering an internal criticism of welfare economics, not a complete presentation of his own views on social philosophy. A brief glance at the article suffices to show this. He remarks, e.g.: "The fact that the free market maximizes social utility, or that state action cannot be considered voluntary . . . in itself implies no plea for *laissez faire* or for any other social system. What welfare economics does is to present these conclusions to the framer of ethical judgments as part of the data for his ethical system."[5]

If the limited intent of Rothbard's welfare criterion is borne in mind, Cordato's criticisms of it fall to the ground. Thus, it is quite true, as Cordato says, that the criterion takes no account of effects of exchanges on third parties or of utility *ex post*. It is entirely in order for Cordato to argue that, from the point of view of a complete social philosophy, these need to be considered. But, it does not follow that the economist, speaking in his professional capacity, can deal with them. Rothbard contends that the economist cannot do so: demonstrated preference forbids it.

He notes, e.g., about the envious: "We are not interested in his opinion about the exchanges made by *others*, since his preferences are not demonstrated through action and are therefore irrelevant."[6] In saying this, Rothbard begs no questions: he would do so only if he concluded that, because a matter is irrelevant to the economist, it is of no importance to the social philosopher. And of course he does not do so. If he wishes to overthrow Rothbard's criterion, Cordato must either arrive at a scientifically acceptable notion of preference to replace demonstrated preference, or else deny that demonstrated preference involves the limitations Rothbard draws from it. Cordato might also claim that given its limitations, Rothbard's criterion has little importance; but this again is a philosophical point that leaves the criterion untouched within economics.

The fundamental flaw of Cordato's criticism is his failure to heed the sage advice of R. G. Collingwood: "I began by observing that you cannot find out what a man means by simply studying his spoken or written statements . . . In order to find out his meaning you must also

[5]Murray N. Rothbard, "Toward a Reconstruction of Utility and Welfare Economics" in Mary Sennholz, ed. *On Freedom and Free Enterprise: Essays in Honor of Ludwig von Mises* (Princeton: D. Van Nostrand, 1956), pp. 261–62. The printing of the essay cited here differs from that used by Cordato, so the pagination does not correspond to his citations.

[6]Ibid., p. 250.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

know what the question was . . . to which the thing he has said or written was meant as an answer."[7]

Beyond this general failing, one of Cordato's points misfires on its own terms. He has rightly noted that an actor's opportunity cost cannot be demonstrated in action. But it does not follow from this that "in Rothbard's model only benefits, that is utility gains, are *recognized*" (p. 43, emphasis added). No one but the actor himself can specify his opportunity cost: but to take account of cost does not require this knowledge. Whatever the cost, we know that, *ex ante*, the expected gains exceed it. This is precisely the recognition of cost.

But this response leads Cordato to a related criticism. Is not Rothbard's point trivially true? "By definition, though, people always expect to benefit, relative to the alternatives, from every action that is undertaken. This is true under any institutional arrangement. An action taken at the point of a gun is expected to result in an increase in utility relative to the available alternatives" (p. 43). True enough; but has Cordato forgotten that two pages earlier, he had pointed out that Rothbard's criterion depends on the definition of a voluntary act? As he there rightly remarked, Rothbard's approach to coercion is clear from his other writings (p. 41). Is it too much to ask Cordato to bear in mind his own statements? Once one offers a definition of "voluntary," it is not at all trivial to say that voluntary actors expect to raise their utility, relatively to their baseline. No doubt the victim of a threat endeavors to maximize his utility "relative to the alternatives." But he hardly can anticipate a rise in utility relative to his starting point.[8]

One more issue and then we can have done with this unfortunate section of the book. Although it is true that Rothbard's welfare criterion does not take account of *ex post* utility, Rothbard does have something to say about it. He contends that the free market tends to maximize *ex post* utility; "in sum, the free market always benefits every participant, and it maximizes social utility *ex ante*; it also tends to be so *ex post*, since it works for the rapid conversion of anticipations into realizations."[9] Adhering strictly to demonstrated preference, Rothbard cannot prove the latter contention; but he is free to argue in a common sense way about tendencies.

[7]R. G. Collingwood, *An Autobiography* (Oxford: Oxford University Press, 1939), p. 31.

[8]I sidestep complications in setting the baseline, arising e.g., from so-called "non-productive" exchanges.

[9]Murray N. Rothbard, *Power and Market* (Menlo Park, Calif.: Institute for Humane Studies, 1978) p. 10.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Cordato's comments on Kirzner's view of efficiency are best taken together with his presentation of his own notion of "catallactic efficiency." He begins, reasonably enough, by setting forward some requirements for a sound Austrian concept of efficiency. But two of these requirements will make any alert reader gasp in amazement: "any analysis of people's preferences must be based on a recognition and acceptance of the guiding principle behind Rothbard's theory of social utility, revealed or 'demonstrated' preference . . . preferences can only be deduced by observing activities. Furthermore, since states of knowledge can and do change with the passage of time, preferences that are revealed at a point in time cannot be assumed to remain constant over time. Again, this is an important part of Rothbard's analysis that can and should be used as a building block for the theory presented here" (p. 59).

I have no quarrel with these requirements—quite the contrary. But Cordato has here taken for his own exactly the doctrines of Rothbard that he earlier condemned. Cordato, it will be recalled, criticized Rothbard's use of demonstrated preference because it led to the neglect of effects on third parties. He rose in protest against Rothbard's failure to consider plans carried out over time. Now, demonstrated preference, exactly as Rothbard uses it, has become a requirement. Apparently, a radical conversion has taken place somewhere on the road between the end of chapter 2 and the onset of Chapter 3. "The stone that the builders rejected has become the chief cornerstone of the temple."

But enough of preliminary: what exactly is Cordato's catallactic efficiency? To understand it, we must return to Chapter 2 and Israel Kirzner. In a section of his early book *Market Theory and the Price System* (1963), Kirzner suggested a criterion of efficiency that rested on the coordination of the plans of market participants. Coordination of plans depends on knowledge; therefore "Kirzner reasons that an economic system can be judged efficient to the extent that it generates knowledge of mutually beneficial exchange possibilities" (p. 47).

Cordato has been greatly influenced by Kirzner's analysis; and his own criterion, as we shall see, bears more than a passing resemblance to Kirzner's prescriptions. But in Kirzner's argument, Cordato finds a crucial flaw. Following Jack High, he points out that an increase in information need not result in the coordination of plans. An entrepreneur, taking advantage of new information, may drive his rivals out of business. By doing so, he upsets their plans as well as those of their customers (p. 52).

If coordination of plans is not the key to the mystery, what can replace it? Catallactic efficiency, Cordato tells us. In this view, the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

efficiency of a catallaxy "is to be judged by the extent to which the catallaxy encourages individuals existing in a social context to pursue their own goals as consistently as possible" (p. 62). What institutional setting will best promote this end?

Since "without access to physical resources all the knowledge in the world would be useless" (p. 63), a stable system of property rights must be established. In it, each person will know what resources he may use in his plans. "In a social setting, where different individuals are pursuing different ends, efficient resource use can only occur when conflicts in the use of resources are minimized" (p. 63).

But if knowledge without property is empty, property without knowledge is blind. Individuals' pursuit of goals depends on the acquisition of knowledge about favorable opportunities for exchange. Here once more a stable system of private property is vital. In it, entrepreneurs will have a financial incentive to bring new information to light through the exploitation of discrepancies in prices (p. 63). Cordato's catallactic efficiency, then, recommends exactly the same institutional setting as does Kirzner: one of private property, in which individuals may use their resources to pursue their own ends, so long as they do not invade the property rights of others (p. 66). This system Cordato terms the Ideal Institutional Setting (IIS).

I entirely agree with Cordato that a system of private property is desirable. With the rationale he advances for the IIS, I am much less satisfied. No doubt each person wishes, other things being equal, to acquire information about profitable exchanges. But it is very far from the case that each individual benefits from the general dissemination of information. This should come as no surprise to Cordato, since he makes this point himself in his discussion of discoordination. (Has he had another memory lapse between Chapter 2 and 3?) Surely if someone's gain in information enables him to overthrow my business, I have not benefited through the spread of more information.

And the point is of much wider application than to the discoordination effects that High and Cordato cite. Consumers may be affected adversely by the spread of information in other ways than through the misfortunes of displaced entrepreneurs. It hardly helps me if others discover my favorite restaurant and crowd me out or if someone else locates the bargain antique I wished to purchase.

If it need not be the case that each individual benefits from an increase in information, why should the maximum spread of information be taken as a criterion of welfare? Whose welfare is advanced by it? Perhaps the contention is that under a system in which the spread of information is maximized, each individual will gain more from knowledge of advantageous exchanges than he will lose through the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

acquisition of information by rivals. But why believe this? No reason has been given to accept it. And to justify the criterion, one needs to add that the net gain to each individual exceeds that of any other workable system. Or should it be the probability of net gain to each individual that is maximized?

Some of the problems of catallactic efficiency stem from one of Cordato's insights. As discussed earlier, he correctly argues against Kirzner that the increase of information need not lead to plan coordination. But, while dropping Kirzner's reason for using the growth of information as a welfare ideal, he retains the standard. "This [Cordato's] view of catallactic efficiency is, in a fundamental sense, Kirzner's standard of welfare economics without invoking interpersonal plan coordination as the normative goal" (p. 70). It is indeed; but, absent Kirzner's justification, he needs to provide some other reason that the general spread of information is to the advantage of each market participant, or at least to no one's disadvantage. Incidentally, even if Kirzner were right that increased information always leads to plan coordination, he would still not have justified his criterion. What if someone lost more by the general coordination of plans than he gained through the coordination of his plans with others? Some people may lose out by the end of a chaotic state of affairs. Why should they support Kirzner's criterion?

But Cordato has another reason besides the spread of information to support catallactic efficiency. Whatever the benefits of maximizing the growth of information, do not the manifest advantages of lack of conflict in the use of resources justify the stable system of property rights of the IIS?

I fear that I must once again dissent. First, in many other systems than the free market, people know what resources are available to them. Suppose, e.g., that the state takes 80 percent of the income of anyone who earns $5,000 or more. Someone who earns $20,000 will know exactly what resources are available to him. Further, while it is surely desirable, for the reasons Cordato states, to know what resources one may use, must this knowledge not be weighed against other goods? Imagine one had a choice between the tax system just described and one in which the government randomly decided each year on a tax rate between 1 percent and 10 percent. Would the former system be preferable, simply because in it one knew exactly the resources that would be available?[10]

[10]It might be objected to the example that in the second case, one always knows one will retain at least 90 percent of one's income: therefore, this is preferable, both on grounds of stability and control of resources, to the 80 percent tax. Although I think this response changes the criterion at issue—stability—to a combination of stability

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Again, granted that each person prefers, other things being equal, that he know the resources he may without conflict use, why is it to each person's advantage that everyone have stable property rights? Perhaps some would benefit from instability in the property rights of their rivals.

One might object in this way to the line of criticism against catallactic efficiency that I have been pursuing. Why does Cordato need to show that the spread of information and a stable set of property rights are to the advantage of each person? Why is it not sufficient that the IIS benefit most people? Here one needs to recall the purpose of a criterion of welfare within economics. Since economics is a value-free science, the criterion must appeal only to non-controversial normative principles (if, indeed, there are such). Otherwise, one is straightaway in the midst of philosophy. It is for exactly this reason that both the neoclassicals and Rothbard use the Unanimity Principle in their respective criteria. As Rothbard puts the point: "Generally, even the most rigorously *Wertfrei* economists have been willing to allow themselves one ethical judgment; they feel free to recommend any change or process that increases social utility under the Unanimity Rule"[11] (Cordato apparently agrees that economics is value free; see p. 90, n. 13).

It may well be that the Unanimity Rule is not so free from controversy as its advocates imagine. But no principle more controversial than it can be used in scientific economics. If, then, Cordato rejects my criticisms on the ground that his criterion need not follow the Unanimity Rule, he confronts a daunting task: he must produce some other normative rule, equally uncontroversial, which supports his criterion. I wish him well in the attempt to do so.

Catallactic efficiency faces yet another difficulty; the problem, however, is not intrinsic to the idea but arises from an earlier section of *Welfare Economics and Externalities*. Before presenting his criterion, Cordato set forward various requirements for an acceptable standard, among them demonstrated preference. He agreed with Rothbard that one cannot assume that people's preferences are consistent over time.

How does catallactic efficiency stand up, measured by Cordato's own requirements? The question answers itself. To say that someone

---

and amount of resources under one's control, the example can be modified to accommodate those who find this response persuasive. Suppose that in the latter system, there is a 1 percent chance that the state will tax 81 percent of total income and a 99 percent chance it will randomly select a tax of 1 to 10 percent. Which system is preferable?

[11]Rothbard, "Toward a Reconstruction," p. 20.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

will better fulfill his preferences given more information or a stable system of property rights seems *prima facie* to require reference to more than the preferences he indicates by his action at a particular time. To assess Cordato's criterion, one needs to use judgments of this kind: "If A had known a, b, and c, he would have chosen x instead of y, raising his level of utility." How can one show, adhering strictly to demonstrated preference, that someone benefits from an increase in information? And even more obviously, increased information and stable property rights are in part desirable because they help people carry out their plans over time, as Cordato himself mentions (p. 61). But to take account of this contradicts his stipulation that preferences not be assumed consistent over time.

The situation then is this. Cordato in Chapter 2 criticized Rothbard's welfare criterion. In Chapter 3, he advanced as requirements for a criterion exactly the features that led to his criticisms of Rothbard in the previous chapter. And when he at last presents his own criterion, it turns out to fail these requirements. Cordato's inability to pursue a consistent line of argument brings to mind Samuel Johnson's observation on conversation with the Highlanders: "the inquirer is kept in continual suspense, and by a kind of intellectual retrogradation, knows less as he hears more."[12]

After presenting his criterion, Cordato discusses its application to externalities and to tort liability. On the whole, his treatment is insightful: he in particular makes valuable criticisms of the Coasean approach to externalities (pp. 92ff). Rather than discuss his analysis in detail in an already long review, I shall select for discussion a few points in his torts liability chapter.

He draws a valuable contrast between the Coasean approach to externalities (particularly as Richard Posner applies it) and his own catallactic efficiency view. Confronted with a legal case in which positive transactions costs prevent the parties concerned from bargaining their way to a solution, "the task of the [Posnerian] judge is to decide *who should* have the property rights, not *who does* have the property rights" (p. 100). The catallactic efficiency position takes just the reverse stand: property rights cannot be taken away by the judge's belief that someone other than the owner will use the disputed property more "efficiently."

Cordato's conclusion is entirely commendable, but a few details arouse misgiving. For one thing, he claims "[T]he theory presented

[12]Samuel Johnson, *A Journey to the Western Islands of Scotland*, R. W. Chapman, ed. (Oxford: Oxford University Press, 1970), p. 45.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

here leads to a non-Pigouvian efficiency defense of strict liability" (p. 100). While I share Cordato's admiration for the work of Richard Epstein on strict liability, I cannot find any argument in the book defending strict liability. Cordato has argued that tort cases should be settled by reference to property titles, rather than on grounds of economic efficiency; but this by itself does not entail strict liability. Epstein succinctly characterizes strict liability in this way: "[the theory] holds the defendant *prima facie* liable whether or not either of the two further conditions relating to negligence and intent is satisfied."[13]

Suppose one agrees with Cordato that judges should decide tort cases on the basis of property rights. How does this by itself settle whether intent or negligence should play a role in assessing damages? Of course, Cordato is right that to use an economic standard as the exclusive criterion of decision is inconsistent with strict liability, and he has criticized doing so. But this is the sum and substance of his "argument" for strict liability.

Cordato rightly points out that the Coasean framework rejects causation; and his instincts are sound in combatting this. But his execution is faulty. He endorses an analysis of causality which he claims his view of strict liability supports. "The notion of strict liability that is derived from that [Austrian] view of property rights casts up a 'but for' test of causality that subverts these conceptual ambiguities. Causality is established, at least *prima facie*, if, but for the fact that the plaintiff (*P*) invaded the property rights of the defendant (*D*), the harm would not have occurred" (p. 102).

He presents on the same page an objection to the "but for" analysis of causation that so far as I can see is perfectly correct. In essence, the objection is this; any necessary condition of an event fulfills the "but for" requirement. If a violation of rights would not have happened "but for" someone's invasion, it would also not have happened "but for" the fact that the property was there. This objection, it should be clear, if correct overthrows neither causation nor strict liability. It is an objection to one particular conception of causality.

Cordato's reply to this objection is: "it is as if all property lines had been erased, or never existed" (p. 102). Not at all! The objection has nothing to do with property rights. Far from responding adequately to the objection, Cordato appears not to have understood it.

[13]Richard A. Epstein, *A Theory of Strict Liability* (San Francisco: Cato Institute, 1980), p. 5.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

As to Cordato's claim that strict liability leads to 'but for' causation, let us hope it is false. Otherwise, one would have an excellent argument against strict liability. Perhaps Cordato, rightly thinking that strict liability requires acceptance of causation, believes that this is why he must accept 'but for' causation. This line of thought would work—but for the existence of other conceptions of causation.

Epstein's view of the issue differs from that of our author. He states: "Its affinity for absurd hypotheticals should suggest that the 'but for' test . . . be abandoned as even a tentative account of the concept of causation."[14] Epstein's analysis of causation depends on certain paradigms, not 'but for'. After presenting one of these paradigms, "*A* hit *B*," he remarks: "No question of 'but for' is ever raised, much less answered."[15] Is Epstein wrong about the implications of strict liability for causation? If so, one would like to know why.

Professor Cordato has obviously read very widely in the literature, and he has the ability to present the essence of a theory simply and clearly. But his many mistakes and inconsistences, along with the failure of his catallactic efficiency standard, make his book largely a missed opportunity. Rigor in argument cannot be abandoned—even if we inhabit an "open-ended universe."

[14]Ibid., p. 16.
[15]Ibid., p. 24.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Mises and Hayek Dehomogenized

Joseph T. Salerno*

A Man of Principle: Essays in Honor of Hans F. Sennholz. John W. Robbins and Mark Spangler, eds. Grove City, Pennsylvania: Grove City College Press, 1992.

An important contributing factor to the resurgence of Austrian economics in the 1970s was the appearance of a handful of articles which drew the attention of the economics profession to the distinctiveness of the tradition of economic theorizing founded by Carl Menger.[1] Arguably the most influential of these articles was written by the eminent Walras scholar, William Jaffé, and entitled "Menger, Jevons and Walras Dehomogenized."[2] In this article, Jaffé argued persuasively that the three founders of marginalism, whose contributions up to that point had tended to be conflated due to an exclusive focus on their contemporaneous discoveries of the marginal principle, each initiated a separate and distinct tradition of economic method and analysis. Taken in conjunction with the 1974 award to F. A. Hayek of the Nobel Prize in Economics and

*Joseph T. Salerno is professor of economics in the Lubin Graduate School of Business at Pace University, New York.

I wish to gratefully acknowledge comments on an earlier draft of this essay by Murray N. Rothbard, David Gordon, Israel M. Kirzner, and Lawrence H. White for helping me to rectify errors and ambiguities in, as well as to generally improve upon, my original exposition. This acknowledgement does not imply that these individuals bear any shred of responsibility for the remaining imperfections in the essay or that the latter two concur in any of its arguments regarding their respective works.

[1]For example, Erich Streissler, "To What Extent Was the Austrian School Marginalist?," *History of Political Economy* 4 (Fall 1972): 426–41; William Jaffé, "Menger, Jevons and Walras De-Homogenized," *Economic Inquiry* 14 (December 1976): 511–24; and the articles in the Special Issue on Carl Menger and the Austrian School of Economics, *Atlantic Economic Journal* 6 (September 1978).

[2]Jaffé, "Menger, Jevons and Walras De-Homogenized."

The Review of Austrian Economics Vol.6, No. 2 (1993): 113–46
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the scholarly conferences on Austrian economics held annually between 1974 and 1976, this article and the others mentioned above broadened and reinforced recognition of and interest in contemporary Austrian economics as an alternative to the prevailing neoclassical paradigm.

But the Mengerian tradition was developed in very different directions by his brilliant followers, Eugen von Böhm-Bawerk and Friedrich von Wieser, and by their own students and followers. Without tracing out this doctrinal development in any detail, suffice it to say that today the term "Austrian economics" is used to designate two very different paradigms. One derives from Wieser and may be termed the "Hayekian" paradigm, because it represents an elaboration and systematization of the views held by F. A. Hayek, a student of Wieser's at the University of Vienna. Although it is yet to be generally recognized by Austrians, Wieser's influence on Hayek was considerable and is especially revealed in the latter's early work on imputation theory, which sought to vindicate the Wieserian (as against the Böhm-Bawerkian-Misesian) position that the imputation problem must be solved within the context of an exchangeless economy subject to the control of a single will yet somehow able to calculate using (subjective) value as the "arithmetic form of utility."[3]

[3]See, especially, F. A. Hayek, "Some Remarks on the Problem of Imputation," in idem *Money, Capital, and Fluctuations: Early Essays*, Roy McCloughry, ed. (Chicago: University of Chicago Press, 1984), pp. 33–54. That there is no possibility of economic calculation and rational or purposeful allocation of resources within an economy based on division of labor where one will alone acts is, of course, the essence of Mises's critique of socialism. Perceiving the unbridgeable gulf between his own and Wieser's position on the possibility of directly imputing values to higher-order goods in the absence of monetary exchange, Mises, in his *Notes and Recollections* ([Spring Mills, Ill.: Libertarian Press, 1978], p. 36), wrote that "[Wieser's] imputation theory is untenable. His ideas on value calculation justify the conclusion that he could not be called a member of the Austrian School, but rather was a member of the Lausanne School." Also, Hayek, explicitly following Wieser, conceives the main problem of capital theory to be to explain how it is that the nonpermanent resources constituting the capital stock can yield a permanent net (physical) return (F. A. Hayek, *The Pure Theory of Capital* [Chicago: University of Chicago Press, 1952], pp. 54–55). This Wieser-Hayek method of describing the *quaesitum* of capital theory loads the dice in favor of explaining the interest return on capital in terms of productivity (rather than time-preference) considerations and, at the same time, diverts attention from what Böhm-Bawerk brilliantly perceived to be the fundamental question that must be satisfactorily answered by a correct theory of interest and was so answered by Mises's pure time-preference theory: What is the cause of the difference in value between goods which differ only in their temporal availability? In theorizing on capital, moreover, Hayek (ibid., pp. 27, 156) makes significant use of the Wieserian device of a communist society subject to the control of an omniscient dictator, a device which reflects a paradigmatic lack of concern with problems of monetary appraisement and calculation. Finally, we have Hayek's revelation that his neutral-money doctrine represents a development, albeit "unconscious," of Wieser's remarks on the

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

The Hayekian paradigm stresses the fragmentation of knowledge and its dispersion among the multitude of individual consumers and producers as the primary problem of social and economic cooperation and views the market's price system as the means by which such dispersed knowledge is ferreted out and communicated to the relevant decision-makers in the production process.[4]

The other paradigm is the "Misesian" paradigm, so called because Ludwig von Mises was the first to systematically expound it. This paradigm represents a development of Böhm-Bawerk's thought and focuses on monetary calculation using actual market prices as the necessary precondition for the rational allocation of resources within an economic system featuring specialization and division of labor.[5]

Unfortunately, the majority of those who currently regard themselves as "Austrian economists" have failed to recognize the considerable differences between these two paradigms. And because Mises was the main influence on Hayek's early writings on business cycle theory and on socialist calculation, the most important manifestation of this failure is the tendency to attribute to Mises positions originated by Hayek or independently developed by those working within the Hayekian paradigm. This tendency is reinforced by what may be called the "Whig presumption," still inexplicably prevailing among many Austrians despite the publication of Thomas Kuhn's book three decades ago, that since Hayek "came after" Mises he must have incorporated in his own work all that was worthwhile in his

---

effects of "a one-sided supply of money" (Hayek, "On Neutral Money," in idem, *Money, Capital, and Fluctuations*, p. 160).

[4]Thus, for example, Wieser's critique of central planning rests on a proto-Hayekian view of the market as the means for solving knowledge problems. Writes Wieser (*Social Economics*, A. Ford Hinrichs, trans. [New York: Augustus M. Kelley, 1967], pp. 396–97): "The one will and command which, in war and for legal unity, is essential and indispensable as the connecting tie of the common forces, detracts in economic joint action from the efficacy of the agency. In the economy, though it has become social, work is always to be performed fractionally.... Part-performances of this sort will be executed far more effectively by thousands and millions of human beings, seeing with thousands and millions of eyes, exerting as many wills: they will be balanced, one against the other, far more accurately than if all these actions, like some complex mechanism, had to be guided and directed by some superior control. A central prompter of this sort could never be informed of countless possibilities, to be met with in every individual case, as regards the utmost utility to be derived from given circumstances or the best steps to be taken for future advancement and progress." I am indebted to Peter Boettke, of New York University, or calling my attention to this passage.

[5]On the crucial significance of monetary calculation in the Misesian paradigm see Joseph T. Salerno, "Ludwig von Mises as Social Rationalist," *Review of Austrian Economics* 4 (1990): 36–41. Also see idem, "Two Traditions in Modern Monetary Theory: John Law and A. R. J. Turgot," *Journal des Economistes et des Etudes Humaines* 2 (June/September 1991): 368–70.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

predecessor's.[6] The result is that attention has been deflected from the Misesian paradigm, and those seeking to deepen and extend it have found it increasingly difficult to gain recognition for their own efforts or to channel the interests and efforts of younger Austrian scholars into the same endeavor. There thus currently exists a pressing need, especially for Misesians, to undertake the task of a courageous and thoroughgoing doctrinal dehomogenization of Hayek and Mises.

Evidence of this need is presented in some of the contributions to this Festschrift honoring Hans Sennholz—ironically, a student of Mises's whose writings on most topics fall squarely within the Misesian paradigm. While this volume contains many informative, instructive, or inspiring papers by individuals who have been associated with Dr. Sennholz in various capacities or who have been profoundly influenced by his prodigious and insightful writings on a broad range of politico-economic subjects, I am mainly interested in a handful of contributions from academic Austrian economists. Rather than offering a critical analysis of these papers, I will restrict myself to demonstrating that, in each case, the author imputes to Mises implicit or explicit support for or authorship of one or more positions originated by Hayek or rooted in a Hayekian view of the market's pricing process.

Let me begin with Israel M. Kirzner's contribution on "Human Action, Freedom and Economic Science" (pp. 241–49), which deals with the evolution of his own understanding of the Misesian concept of human action from the publication of his first book in 1960[7] to 1991, the year the essay under review was completed. In this essay, Kirzner explicitly repudiates the position he took in the concluding chapter of his 1960 book that the defining element of human action is "purposefulness" narrowly construed as expressed in economizing and choice and that the entire structure of Misesian economics, including its adumbration of the dynamic market process, can be logically deduced from insight into the "power of reason to guide purposeful behavior" (p. 244). Now, Kirzner informs us, he has come to realize that his earlier understanding of Mises's position is "inadequate," because it can only yield conclusions about "decisions made in given situations"

[6]This recrudescence of the "Whig presumption" among members and observers of the current Austrian school was recently brought to light in Murray N. Rothbard, *The Present State of Austrian Economics*, Working Paper from the Ludwig von Mises Institute, Auburn, Alabama (November 1992), pp. 4–5.

[7]Israel M. Kirzner, *The Economic Point of View: An Essay in the History of Economic Thought*, 2nd ed. (1960; Kansas City: Sheed and Ward, 1976).

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

and is thus incapable of analyzing "those systematic market processes which are so central to Misesian economics" (p. 244).

While Kirzner still ascribes a central role to the concept of purposefulness in his reinterpretation of Mises, it is a concept purged of explicit reference to economizing and choice and completely redefined in terms of alertness and discovery. Thus for Kirzner, "the purposefulness of human action . . . is the essential key to the discovery by agents that they are in fact *not* in the 'given situations' which they had hitherto assumed to be relevant," and it is the "purposefulness which defines and identifies conscious human action" that motivates "alertness to the dynamic world in which we live" (pp. 245, 247). These essential attributes of purposefulness are summed up elsewhere by Kirzner in the statement that "purposive human action involves a posture of alertness toward the discovery of as yet *unperceived* opportunities and their exploitation."[8] To be sure, in proposing this definition, it is not Kirzner's intention to completely ignore the aspect of purposefulness that is expressed in human choice.[9] However, he offers no argument establishing a logical link between these two aspects of purposefulness and merely asserts a predominating "propensity," inherent in human action, "to sniff out opportunities lurking around the corner," "to discover what is useful," to be alert to opportunities," "to notice what may be useful," etc. By this procedure, Kirzner hopes to provide a praxeological foundation for the *empirical* tendency of the market process toward equilibrium that is alleged by Hayek.[10] Thus Kirzner dismisses what he calls "any programmed pattern of allocative maximization" or "static decision making," i.e., choice, as a trivial expression of purposefulness that is unable to illuminate the equilibrating tendencies of the dynamic market process. In its stead he proposes "discovery," i.e., "man's entrepreneurial propensity to discover changes which can redound to his benefit," as the hallmark of purposive human action (p. 245).

It is important to reiterate at this point that Kirzner is not faulting Mises's conception of purposeful behavior but his own earlier failure to fully comprehend this conception, thereby imputing to Mises the origination of the discovery perspective which Kirzner has so elegantly elaborated in his later works. Thus when confronting the question of why Mises apparently endorsed Kirzner's earlier, mistaken interpretation of his position by writing a laudatory Foreword

[8]Israel M. Kirzner, *Perception, Opportunity, and Profit: Studies in the Theory of Entrepreneurship* (Chicago: University of Chicago Press, 1979), p. 109.

[9]Ibid., pp. 28, 30–31.

[10]Ibid., pp. 13–33.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

to Kirzner's 1960 book, Kirzner responds that Mises did not "explicitly articulate" the insights yielded by this perspective and therefore may well have believed that what was implicit in his own position was also implicit in Kirzner's "superficial exposition" of that position. Or, alternatively and even less plausibly, Kirzner speculates that Mises himself may not have been consciously aware of these momentous implications of his own thought (p. 249, n. 1).

I would like to suggest however that the simplest and most plausible explanation for Mises's uncensorious Foreword is the correct one: Kirzner's concluding chapter gave a full and accurate explication of what Mises knew to be his own "economic point of view," whose central element Mises himself repeatedly and explicitly characterized as purposive human action describable in terms of choice and the efficient allocation of scarce resources. Moreover, contrary to Kirzner's contention, Mises did indeed succeed in deducing from this restricted notion of purposeful behavior catallactic theorems relevant to the analysis of the dynamic market process. Preliminary to arguing this point, I will demonstrate that Kirzner's emphasis on discovery as the essence of purposiveness leaves him unable to logically account for the choice process and, ultimately, for the very existence of acting man.

For Mises, human action, whether isolated or involving monetary exchange, is always motivated by the eagerness of the actor to enhance his welfare and consists of choosing among alternative employments of resources whose necessarily future results are not known with certainty. Because the choice process logically implies uncertainty—choice and action would be obviously futile in a world where humans are predestined to endure a rigidly unchangeable sequence of future events known with perfect certainty—the prerequisite of any specific act of choice is the acquisition of knowledge, via direct experience or from other sources of information, about the events and prevailing circumstances of the recent past that may be relevant in formulating an "understanding" of the future conditions upon which the actions under consideration will impinge. For example, if the actor is choosing among alternative investments of resources for producing goods intended for sale on the market, then information about "current" prices, i.e., realized prices of the immediate past, in addition to qualitative knowledge concerning the most recent technical conditions of production and conditions underlying consumer demands, is an almost indispensable guide to forecasting future market conditions. It is only upon the basis of such knowledge and forecasts that the actor is able to appraise and estimate the future prices of the various products which enter into his calculations

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of monetary profit. These calculations permit his ranking of the alternative investments under consideration, which then enables him to purposefully and efficiently allocate his resources at the moment of choice.

Thus, for Mises, the moment of choice coincides with the emergence of a value scale that is the *raison d'etre* and consummation of the actor's previous "discovery" activities and that provides the framework for purposive behavior. Choice and action can only be conceived as occurring within such a "a given situation." Contrary to Kirzner's later interpretation of Mises, discovery cannot serve as the core of the central axiom in a praxeological system, precisely because there is no possibility of inferring from it the "given situation" prerequisite to the moment of choice. A being who is ever seeking to "discover changes that have occurred" in his situation can never *act* on those discoveries because he is incapable of creating the framework for choosing. In the newer Kirznerian interpretation, therefore, the Misesian *homo agens* has been transformed into *homo quaerens*, a perpetual and aimless seeker of new knowledge who is forever unable to turn it to account in improving his welfare; a shade who has become unstuck in (praxeological) time, having no existence in what Mises calls the "real present," that neverending sequence of "given situations" which is created by purposive entrepreneurial evaluation of past experience and forecasting of the future and in which all action is initiated and all human life is lived.[11]

We have thus established that, according to Mises, "discovery" is logically implied in the very concept of choice and need not be posited as an independent facet of human purposiveness and, furthermore, that the propensity to discover new opportunities, when analyzed in isolation as the essential or predominant feature of purposiveness is incapable of generating any meaningful propositions about human action, not to mention the market process. Or, in other words, from the perspective of Misesian praxeology, entrepreneurial information gathering and forecasting are never autonomous and free-flowing activities directly expressing purposefulness, but are always rigidly governed by the exigencies of choosing under uncertainty. In my interpretation, therefore, it is a significant distortion of Mises's view to say with Kirzner that it is the discovery element in human action rather than "maximizing rationality" that "drives the market" (p. 247); for Mises, it is the fact

[11]For Mises's conception of the "real present," see *Human Action: A Treatise on Economics*, 3rd ed. (Chicago: Henry Regnery, 1966), pp. 100–1. As Mises points out, "The present qua duration is the continuation of *the conditions and opportunities given* for action (ibid., p. 101). I have added the emphases in this quotation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that the entrepreneur desires to efficiently allocate his resources in service of his goal of maximizing profit (and ultimately, utility) that drives both his quest for understanding of future market conditions and, when this quest culminates in the purposive choice of production processes, the dynamic market process.

But what of Kirzner's claim that a theorematic system derived from a concept of purposefulness lacking an independent discovery dimension is unable to elucidate "those dynamic processes through which the market absorbs and responds to exogenous changes" and which are central to Misesian economics (p. 245). In fact Misesian catallactics is exactly the spinning out of the implications of purposeful behavior engaged in by individuals who perceive the benefits of specialization and exchange described by the law of comparative advantage and whose productive activities are oriented by monetary calculation to satisfying anticipated consumer demands in the cheapest possible way. For Mises one of the most important functions of the market process is to provide the meaningful numerical data, the money prices, that are used in such economic calculations. These computations of monetary profit enable each producer to discern and purposefully choose that pattern of uses for his resources that he expects to maximize his satisfaction from participation in the exchange process. Because of the complexity of the technical interrelationships between the factors of production and the innumerable possibilities of their use and combination within a capital-using economy, without the ability to calculate, producers, no matter how much qualitative knowledge of the economic data they discovered or were endowed with, would never be able to use such knowledge in pursuit of their purposes and would abandon social cooperation under the division of labor as a means for enhancing their welfare.[12] Thus, severing choice from discovery, far from elucidating the nature and operation of the dynamic market process, yields the condition under which it ceases to operate.

Having linked up purposive individual behavior with the market process through the theory of monetary calculation, Mises then

[12]For recent discussions of Mises's contribution to the socialist calculation debate that characterize it as essentially an argument about calculation and not knowledge, see Salerno, "Ludwig von Mises as Social Rationalist," pp. 41–49; idem, "Postscript: Why a Socialist Economy Is 'Impossible'," in Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* (Auburn, Ala.: Praxeology Press, 1990), pp. 51–71; Murray N. Rothbard, "The End of Socialism and the Calculation Debate Revisited," *Review of Austrian Economics* 5 (2) (1991): 51–76; and idem, "The Present State of Austrian Economics," pp. 19–22. It seems that Richard Ebeling now also interprets Mises's argument along similar lines. See Richard M. Ebeling, "Introduction" in idem, *The Global Failure of Socialism* (Hillsdale, Mich.: Hillsdale College Press, 1992), pp. 6–8.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

formulated his catallactic theory, based on Böhm-Bawerkian price theory and his own theory of the promoter-entrepreneur, to analyze the operation of this process. For purposes of arguing that Kirzner's view of the market process has much more in common with Hayek than Mises, allow me to briefly enumerate the most salient features of Mises's understanding of the dynamic market process as the outcome of calculable actions.

I focus first on the characteristics of the prices that are generated by the market process and serve as the data for economic calculation. These are realized prices; or, in other words, they are the actual outcome of the historical market process at each moment in time and are determined by the value scales of the marginal pairs in each market. They are, therefore, also market-clearing prices the establishment of which coincides with a momentary situation, what Mises calls the "plain state of rest" (PSR),[13] in which no market participant, given his existing marginal-utility rankings of goods and money and knowledge of prevailing prices, can enhance his welfare by participating in further exchange. However, despite their character as market-clearing prices, these are also disequilibrium prices. Thus as a consequence of the unavoidable errors of entrepreneurial forecasting and price appraisement under uncertainty, most goods are sold at prices that do not conform to their monetary costs of production, thereby generating realized profits and losses for producers. Nor does the law of one price for commodities and the associated but broader law of the absolute spatial equality of the purchasing power of money hold in the PSR, because market conditions are continually changing, while the information of each transactor

[13]According to Mises (*Human Action*, p. 762), "The notion of the plain state of rest as developed by the elementary theory of prices is a faithful description of what comes to pass in the market at every instant. Any deviation of a market price from the height at which supply and demand are equal is—in the unhampered market—self-liquidating." For further discussion of the PSR, see ibid., pp. 244–45. Arthur Marget also clearly recognizes that all prices that actually emerge in the course of the historical market process are and must be market-clearing prices that create a temporary lull in the process. In Marget's words, "the prices which we must ultimately explain are the prices 'realized' at specific moments in clock time [and] the only demand and supply schedules which are directly relevant to the determination of these 'realized' prices are market demand and supply schedules prevailing at the moment the prices are 'realized'. . . ." (Arthur W. Marget, *The Theory of Prices: A Re-examination of the Central Problem of Monetary Theory*, 2 vols. [New York: Augustus M. Kelley, 1966], 2, p. 253). For an exposition of Marget's view of the pricing process and its relevance to monetary theory, see Joseph T. Salerno, "Ludwig von Mises's Monetary Theory in Light of Modern Monetary Thought," presented at the Austrian Scholars Conference, New York City, October 1992 (unpublished ms), pp. 46–50.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

about current conditions is necessarily incomplete and arbitrage processes do not operate instantaneously.[14]

Second, for Mises, the market process is open-ended and entrepreneurial. It is open-ended because the continual exogenous changes in the economic data preclude it from ever reaching a state of long-run equilibrium or what Mises refers to as a "final state of rest" (FSR), in which all commodity prices and the purchasing power of money are perfectly arbitraged, speculative holding of commodity stocks is absent, and profits and losses have been completely eradicated.[15] The FSR is an imaginary construct that enables the economist to isolate and describe the entire sequence of adjustment, including the time-consuming reorientation of the production structure, which results from a given change in the economic data. In FSR analysis, the economist begins with an initial FSR, introduces an alteration in the data, i.e., in tastes, technology, money supply, etc., and then traces out the steps by which the market adjusts to a new FSR, all the while rigidly maintaining a *ceteris paribus* assumption. From this analysis it may be inferred that the reallocation of resources from less profitable to more profitable production processes coincides with an improvement in the satisfaction of consumer wants.

Or the economist may employ FSR analysis to demonstrate that, if at any point in time, all further changes in the economic data were to suddenly cease, the adjustment processes currently operating in response to past changes would eventually culminate in an FSR and, if no further changes intervened, in a state of eternally repetitive robotical activity or "evenly rotating economy" (ERE) in which uncertainty, entrepreneurship, and the demand for a medium of exchange are eliminated and the very conditions of choice and action abolished. This latter mode of employing the analysis is effective in illustrating the point that at any instant in time all purposive behavior aimed at attaining a state of optimum satisfaction is tending toward establishing a state of nonaction. What prevents the emergence of such a state is the neverending flux in the means and ends of action. Thus, from the standpoint of Misesian catallactics, to declare that the market is "equilibrating" can never be taken to mean that the market process ever actually progresses toward a given long-run equilibrium in historical or calendar time. It can mean that

[14]For a Wicksteedian micro analysis of the market's tendency to rapidly establish and maintain interspatial equality in the purchasing power of money, see ibid., pp. 41–45.

[15]Mises's discussion of the nature and uses of the FSR concept can be found in Mises, *Human Action*, pp. 245–46.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

the reallocations of productive resources undertaken by entrepreneurs seeking to exploit anticipated profit opportunities—if and when such profits are realized—result in a relatively improved state of want satisfaction for consumers; or it can mean that the complex of autonomous yet coordinated choices and actions that constitute the market process, at any given moment in historical time, is aimed at establishing an optimum state of consumer satisfaction and would eventuate in such a state in the absence of further change in the data.

But despite its usefulness, FSR analysis was never intended by Mises to provide a grasp of the function of the entrepreneur or "promoter," whose activities drive the open-ended market process actually unfolding in time. For Mises, the promoter concept goes beyond the category of the pure entrepreneur derived from the action axiom, and its construction embodies cognition of a fundamental datum of catallactic analysis: that some people are more adept than others at anticipating and adjusting to change.[16] Within the context of the Misesian market process, promoter-entrepreneurs are those who seek to profit by actively promoting adjustment to change. They are not content to passively adjust their catallactic activities to readily foreseeable changes or changes that have already occurred in their circumstances; rather, they regard change itself as an opportunity to meliorate their own conditions and aggressively attempt to anticipate and exploit it. The real market process is thus entrepreneurial in the sense that it is driven by an identifiable, though ever-changing, class of individuals whose productive activities are guided by monetary calculations based upon purposeful and perpetual forecasting of an uncertain and changing future.[17] As noted above, the prices used in such calculation are the appraised prices of the future, i.e., the prices anticipated to be realized at future moments of an open-ended market process that will never cease to be buffeted by changes in the economic data. It should be emphasized that these prices are *not* the same prices which emerge during the

[16]On the "promoter" concept, see ibid., pp. 254–55, 303–11. As Mises (ibid., p. 585) points out, "What distinguishes the successful entrepreneur and promoter from other people is precisely the fact that he does not let himself be guided by what was and is [i.e., by realized prices], but arranges his affairs on the ground of his opinion about the future. He sees the past and present as other people do, but he judges the future in a different way. . . . The impulse of his actions is that he appraises the factors of production and the future prices of the commodities which can be produced out of them in a different way from other people."

[17]It was William H. Hutt (*The Keynesian Episode: A Reassessment* [Indianapolis: Liberty*Press*, 1979], p. 165) who felicitously described entrepreneurial activity as "dominated by perpetual forecasting."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

course of a *ceteris paribus* or "systematic" (as Kirzner terms it) market process smoothly progressing toward the FSR.

Third, and finally, Mises conceives the market process as coordinative, "the essence of coordination of all elements of supply and demand."[18] This means that the structure of realized (disequilibrium) prices, which continually emerges in the course of the market process and whose elements are employed for monetary calculation, performs the indispensable function of clearing all markets and, in the process, coordinating the productive employments and combinations of all resources with one another and with the anticipated preferences of consumers. Such "price coordination," by insuring that scarce resources are secured by the entrepreneurs bidding the highest prices, also insures that at each instant Böhm-Bawerk's "Law of Costs" prevails, that is, that the constellation of resource prices that emerges on a market unhampered by legal restrictions *always* reflects the circumstance that existing resources are devoted to their most valuable uses as determined by entrepreneurial appraisements of future output prices.[19] It should be noted that as a concept applicable to the real world of uncertainty and change, Misesian price coordination is consistent with the speculative withholding of labor and other resources from current production in anticipation of the later emergence or discovery of more valuable employments.[20] While such speculative activities may modify the shape of the momentary supply and demand curves and the valuations of the marginal pairs

[18]Ludwig von Mises, "The Position of Money among Economic Goods," in *Money, Method, and the Market Process: Essays in Honor of Ludwig von Mises*, Richard M. Ebeling, ed. (Norwell, Mass.: Kluwer Academic Publishers, 1990), p. 65.

[19]On Böhm-Bawerk's law of costs as an early formulation of the concept of price coordination, see Salerno, "Two Traditions in Modern Monetary Theory," p. 369. Böhm-Bawerk's erroneous characterization of his law of costs as "a law which has only approximate validity and teems with exceptions" resulted from his failure to realize that this law does not depend on the assumption of perfect knowledge and foresight. The law of costs no more requires that entrepreneurs have perfect knowledge of future market conditions than the law of marginal utility requires that consumers are able to perfectly predict their future value scales. Both laws require for their full applicability only that agents, whether allocating resources to achieve final consumption goals or the business goal of pecuniary profit, evaluate and rank the *anticipated* outcomes of the alternative actions under consideration. For Böhm-Bawerk's statement of the law, see Eugen von Böhm-Bawerk, *Capital and Interest*, vol. 2, *Positive Theory of Capital*, George D. Huncke, trans. (Spring Mills, Penn.: Libertarian Press, 1959), pp. 248–56. Böhm-Bawerk's error occurs on pp. 255–56. A more detailed presentation and defense of the law of costs can be found in idem, "The Ultimate Standard of Value," in *Shorter Classics of Eugen von Böhm-Bawerk* (Spring Mills, Penn.: Libertarian Press, 1962), pp. 351–70.

[20]On this point see, Joseph T. Salerno, "Commentary: The Concept of Coordination in Austrian Macroeconomics," in Richard M. Ebeling, ed., *Austrian Economics: Perspectives on the Past and Prospects for the Future* (Hillsdale, Mich.: Hillsdale College Press, 1991), pp. 330–40.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

in the affected markets, they do not in any way alter the coordinative quality of the market process.[21]

From the Misesian perspective, price coordination is thus the very essence of the market and a necessary attribute of its real existence. As such it is an *ex post* concept. In the absence of price coordination, e.g., in a regime of all-around price controls, the allocation of scarce resources within the social system of want satisfaction becomes purposeless and chaotic. The concept of equilibration, on the other hand, is an *ex ante* concept expressing recognition that entrepreneurs responding to the lure of expected monetary profits seek to anticipate and remove the continually emerging maladjustments between means and ends and that their success in doing so would culminate in a state of optimum satisfaction, i.e., nonaction. Equilibration therefore presupposes price coordination in the same way that, in a nonsocial process of individual want satisfaction, purposeful allocation of resources presupposes the existence of a unitary value scale by means of which resources can be meaningfully evaluated and ranked.[22]

Let me now contrast this interpretation of Mises's view of the market process as deduced from the axiom of purposeful behavior with the Kirznerian interpretation that ascribes the axiomatic position in Mises's praxeological system to the proposition that individuals have a propensity to discover changes that have already occurred in their given situations. In the latter interpretation, Mises does not view the market as an open-ended process, as a complex entwinement of mutually-influencing historical adjustment processes in various states of completion, a process which is constantly shifting direction in response to new changes in the data and never actually temporally approaches a state of final rest and nonaction. Rather, the Kirznerian interpretation emphasizes the market as a "systematic" process, one that really progresses toward equilibrium by effecting an increasing coordination of the plans of market participants. The ultimate goal of this process, the perfect coordination of individual plans, is an attribute of the final equilibrium state. But such "plan coordination" is worlds apart from the concept of price coordination adumbrated

[21]For an analysis of speculation which demonstrates that, whether successful or not, it does not impede the functioning of the coordinative market process, see Murray N. Rothbard, *Man, Economy, and State: A Treatise on Economic Principles*, 2 vols. (Los Angeles: Nash Publishing, 1970), 1, pp. 112–18.

[22]This understanding of equilibration as a strictly *ex ante* concept accords with the "purely logical concept of equilibration" superbly expounded and defended by George Selgin. See G. A. Selgin, "Praxeology and Understanding: An Analysis of the Controversy in Austrian Economics," *Review of Austrian Economics* 2 (1988): 33–43.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

above. The latter concept, as I have argued, refers to a realized coordination of all the disparate and contingent individual buying and selling plans underlying the market demand and supply curves that actually exist at any given moment in a changing and uncertain world. Plan coordination, on the other hand, describes an imaginary situation in which automatons endlessly repeat a logically consistent pattern of actions, a situation that is akin to the perfect adaptation of the elements of a completely robotized factory to one another.

In fact, Kirzner's discovery perspective does not originate in Mises's concept of human action but in Hayek's conception of the market as a means for disseminating the knowledge which systematically guides decentralized and initially ignorant decision-makers toward a full, *ex ante* coordination of their various production and consumption plans.[23] But since *ex ante* plan coordination can only be achieved in long-run equilibrium—is a condition defining such equilibrium—as both Hayek and Kirzner recognize, Kirzner is forced to shift his analytical focus from the real-world, open-ended market process to a hypothetical market process which is generated by initial ignorance among market participants of the full range of exchange opportunities afforded by the prevailing and *fixed* configuration of the economic data and which must therefore eventually terminate in an FSR.

With the possibility of exogenous change and genuine uncertainty thus banished from its purview, Kirzner's analysis of the market process has no use for the concept of the dynamic promoter-entrepreneur who is perpetually forecasting and appraising the future in quest of anticipated profit opportunities. The market process is now characterized as driven toward its fixed and final goal of perfect-plan coordination by discoverer-entrepreneurs alert to "changes that have occurred in their very market situations," i.e., to contemporaneously emerging discrepancies between prices of the same good available at different locations or in different forms (virtual products, i.e., resources and actual products). In these quasi-static conditions, production loses its temporal dimension and may be conceived of as a matter of pure arbitrage, i.e., of simultaneously buying and selling the same good in spatially diffuse markets. It is only under these circumstances, where producers may be characterized as arbitrageurs, that the Hayekian proposition that information about prices of the immediate past

[23]Hayek (*Pure Theory of Capital*, p. 23) referred to this state of affairs as "a state of complete compatibility of *ex ante* plans." Adopting the preferred terminology of current Hayekians, I refer to it alternatively as "*ex ante* coordination of plans."

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

substitutes for detailed qualitative knowledge of past and future market conditions in guiding the production process holds true. As producer-arbitrageurs act to exploit newly-discovered discrepancies between prevailing input and output prices, ignorance of mutually beneficial exchange opportunities among market participants measurably diminishes, the buying and selling plans of individuals are progressively coordinated (in the *ex ante* sense), and prices are systematically driven toward their final equilibrium values.

Once we drop the assumption of an absence of exogenous change in analyzing the market process, Kirzner's characterizations of the entrepreneur as an alert discoverer of existing opportunities, of the market process as the means for plan coordination, and of realized prices as a surrogate for qualitative knowledge about the economic data all fall to the ground. And this we indeed must do in interpreting Mises, because he does not employ such an assumption for analyzing the function of the entrepreneur or deducing conclusions about the dynamic market process. As I pointed out above, for Mises, FSR analysis, which utilizes this assumption, is primarily useful for demonstrating that the consequences of a change in the economic data are not restricted to the initial adjustment of the market price but also involve longer-run adjustments in resource allocation and the production structure.

Hayek, on the other hand, even in his earliest writings on business-cycle theory, in which he was most heavily under Mises's influence, envisaged the economy as actually departing from and rapidly returning toward a "static state" under impact of changes in the data. Thus, in *Monetary Theory and the Trade Cycle*, for instance, Hayek wrote that "For so long, at least, as disturbing monetary influences are not operating, we have to assume that the price which entrepreneurs expect to result from a change in demand or from a change in the conditions of production will more or less coincide with the equilibrium price. For the entrepreneur . . . will generally be in a position to estimate the price that will rule after the changes have taken place [i.e., in the new FSR]."[24]

While in later writings Hayek emphasized that the state of equilibrium and *ex ante* plan coordination is "an admittedly fictitious construction" never to be observed in the real world, he still insisted that the efficiency of the economic process is to be gauged by its observed proximity to such a state. Accordingly, in the *Pure Theory*

[24]F. A. Hayek, *Monetary Theory and the Trade Cycle*, N. Kaldor and H. M. Croome, trans. (New York: Augustus M. Kelley, 1966), p. 29.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

of Capital, he argued that the "justification" of the concept of equilibrium "is not that it allows us to explain why real conditions should ever in any degree approximate towards a state of equilibrium, but that observation shows that they do to some extent so approximate, and that the functioning of the existing economic system will depend on the degree to which it approaches such a condition."[25] Affirming the "tendency" of market prices to conform to their equilibrium levels, Hayek clearly indicates that he considers the historical market to usually operate in close proximity to the equilibrium state. Thus he defines "tendency" in the following terms: "A given phenomenon may tend to [approximate towards] a certain magnitude if in a great number of cases it may be expected to be fairly near that magnitude, even if there is no reason to expect that it will ever actually reach it, however long the time allowed for the adjustment."[26]

Indeed, as Hayek points out, in order for prices to fulfill their knowledge-disseminating and plan-coordinating functions, the economy must subsist in a state of what I will call "proximal equilibrium," wherein realized prices are always fairly accurate indicators of future prices. Writes Hayek:

> successful economic action [or the fulfillment of the expectations which prompted it] depends largely on the approximately correct predication of future prices. These predictions will be based on present prices and their trends. . . . Indeed the function of prices is precisely to communicate, as rapidly as possible, signals of changes of which the individual cannot know but to which his plans must be adjusted. This system works because on the whole current prices are fairly reliable indications of what future prices will probably be.[27]

Kirzner evidently rejects the Hayekian concept of proximal equilibrium as a realistic description of the operation of the market economy, arguing that "the market is in a continual state of flux and is never in or near a state of equilibrium." He then goes on to argue that "the [endogenous] layer of change, consisting of systematic equilibrating tendencies (which never do manage to become fully completed before being disrupted by new exogenous change) is responsible for the degree of allocative efficiency and of growth potential that market

[25]Hayek, *Pure Theory of Capital*, pp. 27–28.

[26]Ibid., p. 27, n. 2.

[27]F. A. Hayek, *Denationalization of Money—The Argument Refined: An Analysis of the Theory and Practice of Concurrent Currencies*, 2nd ed. (London: Institute of Economic Affairs, 1978), p. 82.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

economies display."[28] But, if this is the case, Kirzner must logically conclude, which he does not, that market economies are not very efficient at all, because he has already argued that the market process never proceeds very far toward the ideally efficient state of perfect plan coordination.[29] This point aside, Kirzner's theory of the discoverer-entrepreneur, whose activities systematically drive market prices toward their equilibrium configuration, can be viewed as an attempt to liberate Hayek's notion of catallactic efficiency as the *ex ante* coordination of decentralized plans from its dependence upon the vague and untenable assumption of proximal equilibrium as the normal state of the historical market economy. However, Kirzner's attempt itself implicitly invokes the ideas of quiescent calendar periods which separate successive exogenous shocks and during which equilibrating endogenous changes are given scope to work themselves out to some extent.

But there is no more basis in Mises's work for Kirzner's idea of real-time equilibration than there is for Hayekian proximal equilibrium. As Mises emphasized, it is impossible to determine and meaningless to suggest that the real economy is closer to the FSR, and therefore manifests a superior coordination of plans and greater allocative efficiency, at one instant of time than it was at a previous instant. For Mises, each moment that passes introduces fresh exogenous changes into the system which impinge upon and reorient the ongoing market process toward a new FSR. As a result, very little can be established about the progress of any one of the host of individual adjustment processes that compose the market process. In fact the very idea of a single, compartmentalized adjustment process is no more than a useful analytical fiction which permits the economist to make sense of the overwhelmingly complex phenomena of the unitary market process. In Mises's words, "The various adjustment processes are in reality not isolated. Synchronously an indefinite number of them take their course, their paths intersect, and they mutually influence one another. To disentangle this intricate tissue and to observe the chain of actions and reactions set into motion by a definite change of the data is a difficult task for the historian's understanding and the results are mostly meager and questionable."[30]

[28]Israel M. Kirzner, *The Meaning of the Market Process: Essays in the Development of Modern Austrian Economics* (New York: Routledge, 1992), pp. 38–39.

[29]However, if Kirzner's standards for efficiency are relatively undemanding and are met by even small movements of the market process toward his ideal of perfect plan coordination, then this criticism loses its force. I am indebted to David Gordon for enlightening me on this point.

[30]Mises, *Human Action*, p. 653.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

In the alternative interpretation of Mises's view of the market process that I have been expounding, the notion of allocative efficiency has nothing to do with the Hayekian criterion of plan coordination. Rather, it derives from an analysis of principles of purposeful behavior. Thus, from the *ex ante* standpoint, the market economy is perfectly efficient, because entrepreneurial decisions based upon monetary calculation always result in the appraisement and allocation of resources in strict accordance with anticipated consumer preferences, in the same manner in which the choices of an individual actor produce a pattern of resource use reflecting his value ranking of expected satisfactions. Thus the Böhm-Bawerkian law of costs, according to which the money price of each and every resource always corresponds to the lowest appraised of the employments for which its available quantity just suffices, i.e., its expected marginal revenue product, is the perfect catallactic equivalent of the law of marginal utility that governs autistic exchange. Far from being trivial, this concept of *ex ante* efficiency is indispensable for distinguishing the unhampered market economy from other conceivable methods of organizing social cooperation under a division of labor. Thus a completely centrally-planned industrial economy is impossible of realization because, in the absence of actual exchange of productive factors and genuine factor prices, the planners are unable to "cost" and therefore purposefully or efficiently allocate the given resources under their control in accordance with even their own known scale of ends valuation.

The criterion of social welfare that is implicit in Misesian catallactics is therefore "Böhm-Bawerk efficiency," which emphasizes the role of monetary calculation in enabling individuals to rationally evaluate and allocate the means at their disposal when pursuing their goals through social action, i.e., action that makes use of voluntary exchange and the social division of labor to realize its aims. Whereas Pareto efficiency and its Hayek-Kirzner plan coordination variant represent unrealizable standards—because based on perfect information and foresight—for evaluating the social *outcomes* of the choice process, Böhm-Bawerk efficiency invokes an ideal but attainable standard, i.e., the efficient *ex ante* allocation of resources by an individual choosing under uncertainty, and indicates the day-to-day coordinated functioning of the economy that results when the institutional *preconditions* of monetary calculation and, therefore, of rational social action are fulfilled. Judged by this criterion, the erroneous forecasts and malinvestments that sometimes characterize entrepreneurial choices are not proof against the efficiency of the real-world market; the market is efficient

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

because it enables individuals to calculate and therefore to make meaningfully choices to reap the overwhelming benefits described by the law of comparative advantage and not because it yields absolute or approximate certitude about the outcomes of these choices (which is, in any event, also denied to autarkic choosers). In sum, the unhampered market is *socially* efficient because it provides the incentive for social action by establishing a tight producer-consumer nexus that gives full sway to consumer choice in determining the allocation of resources.[31] On the other hand, any coercive intervention into the market, which necessarily distorts or annuls its intricate calculational nexus coordinating consumer preferences and entrepreneurial choices, *ipso facto* generates a less efficient allocation of resources, i.e., one that does not completely and exclusively reflect the anticipated preferences of the participants in the social division of labor, and lowers social welfare. We may thus conclude that every act of intervention unambiguously lowers social welfare.[32]

Regarding *ex post* efficiency, the market economy is once again on all fours with the autarkic economy, with entrepreneurial errors and inefficiencies in production the inevitable product of uncertainty and change. However the market economy does embody a process which operates to minimize such errors and efficiencies. This is what Mises calls the "selective process," which is continuously and actually operating in calendar time via monetary profits and losses to weed out

[31]Mises, of course, vigorously upheld "consumer sovereignty" as the operating principle of the unhampered market economy, while demonstrating the coordinative property of the market's price structure and its indispensability to economic calculation and rational social action. However, curiously, he never attempted to derive a formal criterion of social welfare from these elements.

[32]Murray N. Rothbard (*Toward a Reconstruction of Utility and Welfare Economics* [Burlingame, Calif.: Center for Libertarian Studies, 1977]) has ably demonstrated on purely scientific grounds that government intervention always fails to increase social welfare. In advancing to our more radical conclusion, we are able to completely discount any gains, in terms of direct utility or exchangeable goods, that accrue to the interveners and their beneficiaries, while remaining safely within the bounds of strict *Wertfreiheit*. The concept of Böhm-Bawerk efficiency is only concerned with the utility that derives from actions that take place completely within the social nexus, that is, the utility of "productive" consumers who earn income—and only to the extent that they earn this income—through voluntary exchange. Since it is the prospective or *ex ante* utility to be derived from acts of consumption that provides the rationale for individuals to participate in the social division of labor, it is their preferences and demands that must serve as the sole and ultimate standard of socially efficient resource use. Thus, for example, the redistribution of income to "nonproductive" consumers may be represented as a net siphoning off of resources from society that reduces the utility of at least some of its members and weakens their incentives for social action. The market demands of the nonproductive recipients of these resources then can be treated as falsifying monetary calculation and fostering a socially inefficient reallocation of productive resources.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

from the market the relatively unastute and inefficient entrepreneurs while transferring the power to choose the best uses and technical combinations of productive resources to the more farsighted and technically proficient entrepreneurs.[33]

In the Kirznerian interpretation there is no clear and meaningful distinction drawn between *ex ante* and *ex post* efficiency because the entrepreneur as *homo quaerens* never confronts the moment of choice, which would involve him in the purposeful allocation of resources or "Robbinsian economizing." Nor, for the same reason, can the historical market process in this interpretation possess a means of systematically eliminating less successful entrepreneurs and shifting control over productive processes to the more successful. Never burdened with the necessity of *choosing*, discoverer-entrepreneurs need never place any resources at risk of loss in *deciding* to seize a profit opportunity. In criticizing the term "decision-making" which had come into vogue along with other technocratic jargon in the 1950s, Mises pointed out that the term is "designed to divert attention from the fact that what matters is not simply to make a choice but to make the best possible choice. This means: to proceed in such a way that no less urgently desired end should be satisfied if its satisfaction prevents the attainment of a more urgently desired end."[34] Given the obvious importance that Mises attaches to purposeful choice in his praxeology and catallactics, it is difficult to fathom that he would have acquiesced in an interpretation of his view of the market process that assigns the central role to a nonchoosing entrepreneur.

Perhaps one of the more unfortunate consequences of the homogenization of Mises's and Hayek's thought is manifested in the common tendency of current Austrian economists to formulate their entire research program in terms of a dictum uttered by Hayek, while uncritically attributing support for such a program to Mises. The dictum to which I refer is Hayek's oft-quoted remark that "it is probably no exaggeration to say that every important advance in economic theory during the last hundred years was a further step in the consistent application of subjectivism."[35] For Mises, however, the goal of theoretical research in economics was not to simply "extend subjectivism," but to elucidate the crucial link between the subjective realm of individual purpose and valuation and the social pricing

[33]On the selective process, see Mises, *Human Action*, pp. 311–15.

[34]Ludwig von Mises, *The Ultimate Foundations of Economic Science: An Essay on Method*, 2nd ed. (Kansas City: Sheed Andrews and McMeel, 1978), p. 69.

[35]F. A. Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason*, 2nd ed. (Indianapolis: Liberty*Press*, 1979), p. 52.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

process that provides the objective data for economic calculation. According to Mises, such an endeavor must begin with "that brilliant achievement of the classical economists . . . essentially a theory of calculated action" and then broaden it into a "a system dealing with all human choices, a general theory of action."[36] Elsewhere Mises wrote that "supply and demand are only the links in a chain of phenomena, one end of which has . . . visible manifestation in the market, while the other is anchored deep in the human mind."[37] A further indication that Mises perceived the task of modern economics to be that of explicating the connection between individual purpose and the objective catallactic foundations of society is Mises's letter to Hayek in which he relates that he was initially undecided whether to entitle his *magnum opus Human Action* or *Social Cooperation*.

Richard M. Ebeling's contribution to the volume "Variations on the Demand for Money Theme: Ludwig von Mises and Some Twentieth-Century Views" (pp. 127–38) exemplifies this confusion of research programs. Ebeling gives a very good account of the essential differences between Mises's cash-balance approach to the demand for money, which derives from Carl Menger, and the Cambridge cash-balance approach as formulated in the writings of A. C. Pigou and drawn from the "oral tradition" which had been initiated by Alfred Marshall. Ebeling then proceeds to analyze the neo-Keynesian and monetarist macroeconomic approaches from the perspective of the methodologically individualistic Misesian approach, criticizing the propensity of both monetarists and Keynesians to argue in terms of the stability or instability of the aggregate demand for money. Unfortunately, in his critique, Ebeling throws out the demand-for-money baby with the stability bathwater, arguing that "from Mises's perspective, it is inappropriate to speak about *the* demand for money and *its* stability" and that "to speak of the community's 'aggregate demand for money' is not only methodologically unsound, but analytically incomplete" (pp. 135, 137).

Contrary to Ebeling's assertion, however, Mises did indeed hold that individual demands for cash balances could and should be aggregated into an overall market demand schedule for money. Thus, while he warned that investigation into the demand for money could not "begin with the demand for money of the community," he fully accepted the legitimacy of aggregating the individual demands into a social demand, declaring that "[t]he demand for money of the

[36]Mises, *Human Action*, p. 231.

[37]Ludwig von Mises, *The Theory of Money and Credit*, H. E. Batson, trans., 2nd ed. (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1971), p. 131.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

economic community is nothing but the sum of the demands for money of the individual economic agents composing it."[38] While such a seemingly innocuous aggregate of homogeneous quantities may very well violate some unwritten canon of the Hayekian "subjectivist" paradigm, Mises clearly recognized that without reference to *the* demand for and supply of money it would be impossible to carry out the core of his own research program: integrating value and monetary theory to permit the explanation of the unified structure of money prices whose existence is the *sine qua non* for economic calculation and the purposeful allocation of resources within the framework of an economy based upon the division of labor.

In support of his anti-aggregation interpretation, Ebeling adduces Mises's insights that: (1) the purchasing power of money is not a single price but an array of the alternative quantities of the various goods which the monetary unit commands in exchange and (2) changes in the supply of money never affect the elements of this purchasing-power array simultaneously and equiproportionally and therefore invariably result in permanent redistributions of real income and wealth (p. 136). But, as Mises clearly recognized, these important insights establishing the nonneutrality of money are not relevant to the question of whether or not money-demand schedules may be properly aggregated across individuals; rather, they speak to the issue of the shape of the aggregate demand curve for money, leading to the conclusion that such curves can never be rectangularly hyperbolic.[39]

Although reluctance to employ the concept of a social demand for money cannot properly be attributed to Mises, it can be detected in Hayek's early works on business cycle theory. Thus, in *Monetary Theory and the Trade Cycle*, Hayek criticizes Menger and Mises for "including in the theory of the value of money *all* influences of money on prices."[40] In effect, Hayek is reproaching Mises in particular for attempting to provide an integrated analysis of variations in the supply of money in terms of both their systematic effects on relative prices and their effects on the height of overall prices, rather than just concentrating on the former type of analysis which Hayek considers the "far more important task" of monetary theory.[41] In *Prices and Production*, Hayek goes even further to encourage the realization by monetary theorists of "the superfluity of the concept of a general value of money, conceived as the reverse of some price level." He goes

[38]Ibid., pp. 131–32.
[39]On this point, see Salerno, "Mises's Monetary Theory," pp. 19–33.
[40]Hayek, *Monetary Theory and the Trade Cycle*, p. 117, n.
[41]Ibid.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

on to write that the type of monetary theory whose development he looks forward to "will be no longer a theory of the value of money in general, but a theory of the influence of money on the different ratios of exchange between goods of all kinds."[42] Lest it be thought that Hayek is here objecting only to the concept of a statistical price level, it should be noted that his critique of Menger and Mises was advanced despite his explicit recognition that their notion of the general value of money ". . . has nothing to do with any measurable value, in the sense of some price level."[43] By challenging the very notion of the general purchasing power of money, Hayek, of course, is implying the uselessness of the concept of an aggregate demand for money.[44]

In contrast to the Wieser-Hayek position,[45] however, Mises held that the social appraisement of productive factors via entrepreneurial competition in resource markets, which is the very basis of economic calculation and purposive action, can only proceed in monetary terms.[46] Thus, in the course of estimating the expected marginal revenue products of the various inputs into his planned production processes and determining what prices to bid for them, the entrepreneur cannot help but estimate the absolute height of prices, i.e., the general purchasing power of money, because the exchange ratios between the various present goods and between present and future goods, i.e., Hayek's all-important "relative prices," are and must be embedded in the structure of money prices. Or, to put it another way, money's nonneutral effects on the economy operate only through the medium of *money* prices.

These considerations tend to be lost sight of when focusing on Hayekian proximal equilibrium because, outside of an uncertain and changing world, there is no need for a monetary appraisement process to continually revolutionize and recreate the price structure; in proximal equilibrium, money plays the role of a shadowy *numeraire*, and efficient action depends only on entrepreneurs knowing the currently prevailing configuration of relative prices, which serves as a good, if

[42]F. A. Hayek, *Prices and Production*, 2nd ed. (New York: Augustus M. Kelley, 1967), p. 29.

[43]Hayek, *Monetary Theory and the Trade Cycle*, p. 117, n.

[44]As Hayek ("On Neutral Money," p. 161) concludes, ". . . the theoretical concept of neutral money, which relates to the influence of money upon the price relationships [simultaneous and intertemporal] determined by real factors, cannot bear any relation at all to the concept of some 'price level' [even if this concept is introduced merely implicitly in the form of a 'demand for money' related to a definite price level]."

[45]As set forth in Hayek, "Some Remarks on the Problem of Imputation."

[46]See Mises, *Human Action*, pp. 331–38, for an explanation of the distinction between imputation and appraisement as these processes relate to the valuing of higher-order goods and of the relevance of this distinction for economic calculation.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

not perfect, indicator of their likely future configuration. For Hayek, it is only when the money spending stream expands or shrinks that it has a nonneutral impact on the economy by causing reversible changes in the ruling barter rates of exchange and jarring the economy temporarily out of its proximal equilibrium. For Mises, on the other hand, it is only the existence of a real and tangible medium of exchange, with a market and, hence, a driving force all its own, that permits the operation of market processes at all. From Mises's standpoint, then, it is not the inescapable fact of money's inconsistency with an imaginary state approximating equilibrium but monetary intervention misdirecting the dynamic appraisement process that falsifies entrepreneurial calculations, undermines efficient resource allocation, and discoordinates the economy.

Sanford Ikeda's contribution, entitled "The Dynamics of Government Intervention: Theory and Implications" (pp. 201–12), is an interesting and original effort to formulate "a more systematic theory of what can be called the 'interventionist process'" that takes Mises's critique of interventionism as its point of departure (p. 202). What Ikeda seeks is to integrate the Misesian critique with public choice theory as a means of explaining the observed "ebb and flow of government growth," featuring prolonged periods of progressive deregulation alternating with periods of increasing interventionism, with neither the deregulatory phase nor the interventionist phase ever culminating in complete laissez-faire or thoroughgoing socialism, respectively (pp. 203–4).

In analyzing the "Misesian interventionist dynamic" which drives the process, however, Ikeda resorts to the Kirznerian discovery view of entrepreneurship, wherein the entrepreneur "serves a social function by [unintentionally] solving the knowledge problem" (pp. 204–5). By discovering and arbitraging discrepancies between simultaneously existing prices of the same or virtually the same goods, the entrepreneur repairs the gaps in knowledge of decentralized market participants and better coordinates their individual buying and selling plans. As I argued above, however, this view is at odds with Mises's theory of entrepreneurship, which focuses on the entrepreneur's function of *calculating* the most valuable uses of currently available inputs on the basis of *anticipated* output prices.

Ikeda also uses the Hayekian concept of "unintended consequences" to describe the outcome of single acts of intervention, and he characterizes the interventionist process as an "unintended process" (p. 205). From the Misesian perspective, however, the motivation for the various acts of intervention is precisely those immediate benefits that are intended by its proponents. And while Mises admits

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

that there may be "unforeseen" long-run consequences of any intervention, he attributes them not to an inevitable and irremediable condition associated with the Hayekian "knowledge problem," but to antisocial and deliberately obscurantist ideologies that blind the masses to the conclusions of economic theory.

Moreover, Mises's analysis of the interventionist process does not preclude the possibility that the proponents of an intervention recognize and intend its generally unforeseen consequences. Thus unions support minimum wage laws precisely because these laws price low-skilled workers out of the labor market and increase the demand for skilled union workers, while bureaucrats manning municipal rent-control boards may welcome the growing apartment shortage resulting from rent control because it increases their power, prestige, and the value of the favors they can bestow. Indeed, it is precisely the goal of many radical environmentalists to cripple capital formation and productivity and to bring about a decline of real income and population via environmental regulations. The very crises which regularly recur as the interventionist process proceeds also may be desired by those who are ideologically committed to the extension of political control over the economy.

Finally, I contend that Ikeda is simply incorrect when he asserts that "the reasoning underlying [Mises's] critiques of both socialism and interventionism [is] the same—the existence of the knowledge problem makes the consequences of government intervention nasty and unexpected" (p. 208). First, as Mises emphasizes time and again throughout his writings, "economic calculation," and not knowledge, is the "essential and unique problem of socialism."[47] Thus, according to Mises, even if the central planning board was endowed with full and perfect knowledge of the relevant economic data, without recourse to monetary calculation using genuine market prices, it would not be able to determine the optimal among the infinitude of possible uses and technical combinations of the available factors of production.[48] Second, as I have just pointed out, from the Misesian perspective, the consequences of an intervention are not necessarily "unexpected" to its active promoters and beneficiaries and need not continue to be so to the masses it victimizes.

In his essay on "Mises on Free Banking and Fractional Reserves" (pp. 517–33), Lawrence H. White interprets Mises's advocacy of free banking based on fractional gold reserves as a program for economiz-

[47]Ibid., p. 703.

[48]For a review of Mises's argument on this point, see Salerno, "Postscript: Why a Socialist Economy Is Impossible," pp. 52–54.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

ing on the resource costs of supplying the medium of exchange while insuring that the issuance of fiduciary media is regulated in accordance with the desideratum of a neutral money, i.e., a money that does not impinge upon or distort the underlying real processes of the economy. It was Adam Smith, the acknowledged father of free banking, who introduced into monetary theory the proposition that a pure specie money involved a waste of scarce resources, while it was Hayek who originated the concept of, if not the term, "neutral money." According to Hayek in his most mature writings, the "nearest practical approximation" to such an admittedly "fictitious" ideal is a monetary system in which "increased demand for liquidity" is met by increases in the money supply aimed at maintaining stability of an index of raw materials prices that serve as a proxy for the average prices of the original factors of production, land and labor.[49] Assuming no increase in the stocks of the original factors, the practical attainment of Hayek's monetary ideal would result in "constancy of the money stream,"[50] which, not coincidentally, also happens to be the desired goal of modern free bankers.[51]

In his paper, White characterizes Mises as the prototype of modern free bankers, who opposed any ban on competing private banks issuing fiduciary media redeemable in gold on demand on the grounds that ". . . such a ban (1) would make the economy more vulnerable to money demand shocks, and (2) would needlessly increase the cost of supplying the economy with media of exchange" (p. 528). As White notes, this interpretation of Mises's rationale for free banking clashes sharply with Murray Rothbard's argument that Mises favored free banking as a preferred means of suppressing the issuance of fiduciary media, because it circumvents the dangers associated with ceding virtual control over the banking system to government, a result that

[49]Hayek, *Denationalization of Money*, pp. 84.

[50]Ibid., p. 77.

[51]For the free banking argument in favor of maintaining "monetary equilibrium," defined in Hayekian terms as a constant aggregate spending flow, see George A. Selgin, *The Theory of Free Banking: Money Supply under Competitive Note Issue* (Totowa, N.J.: Rowman & Littlefield, 1988), pp. 52–69. I should note that nowhere in his essay does White invoke the Hayekian concept of "neutral money." In fact, in another essay, White expresses mild skepticism about whether a free banking system is fully compatible with any macroeconomic norm including Selginian monetary equilibrium, although he seems to count it as a merit of the system's operation that it comes relatively closer to obeying this norm in practice than the central banking alternative. See Lawrence H. White, "Commentary: Norms for Monetary Policy," in Ebeling, *Austrian Economics*, p. 477 . Nonetheless, as I shall argue below in the text, the goal of "avoiding monetary demand shocks," which White imputes to Mises as a reason for supporting free banking and which White himself is obviously sympathetic to, is tantamount to stabilization of the money-spending stream.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Mises believed might be entailed by an outright legal prohibition of fractional reserves.

In fact, White's interpretation of Mises's views on fractional reserves and free banking is based on his unwarranted, if unintentional, homogenization of Mises with Smith on the question of the criteria of an ideal monetary system. White falls into error because he overlooks important passages in the very works of Mises that he cites, and because he ignores significant developments in Mises's theory of money that occurred between the publication of the first German edition of *The Theory of Money and Credit* in 1912 and the publication of *Nationalökomie* (the German language forerunner of *Human Action*) in 1940. In his 1940 work, Mises tells us, his "monetary theory achieve[d] completion" with the merger of "the theory of indirect exchange with that of direct exchange into a coherent system of human action.[52] These developments resulted in an important modification of Mises's earlier assessment of the relative benefits and costs of fiduciary media that is not acknowledged by White.

As White correctly points out (pp. 520–22), in *The Theory of Money and Credit*, Mises identifies three significant benefits of the issuance of fiduciary media. The first benefit involves the prevention of "convulsions" to economic activity that would have occurred in the absence of an expansion of the money supply caused by the creation of fiduciary media as a result of "an enormous extension of the demand for money" and the consequent increase in its purchasing power that was brought about by the historical extension of the money economy. The second benefit is the familiar Smithian one of reducing the "cost of the monetary apparatus." And the final benefit of fiduciary media is that their issuance sufficiently enhanced the profitability of the credit activities of the banking system early in its history to permit its survival and growth. The only disadvantage of fiduciary media that Mises recognized in this book, according to White, is a relatively minor one: the risk of default by the issuing bank due to mismanagement or bank runs. Thus White concludes that Mises "viewed fractional-reserve banking as a natural and desirable development in a free society" (p. 522).

But White's conclusion is mistaken, attributable to his failure to fully come to terms with one of Mises's most famous contributions to economic theory: his demonstration of the causal link between fiduciary media and the business cycle. White (pp. 524–25) evidently holds that according to Mises business cycles are generated by the

[52]Mises, *Notes and Recollections*, p. 112.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

overexpansion of fiduciary media by central banks unrestrained by competitive market forces. However, Mises's chapter on the business cycle, following directly upon the chapter enumerating the benefits of fiduciary media which White cites in support of his own interpretation,[53] makes it pellucidly clear that the necessary and sufficient cause of the cycle is the unsustainable divergence between the "loan" and "natural" rates of interest effected by the creation of fiduciary media. For Mises, then, cyclical discoordination of the economy is indeed a disadvantage to be counted against fiduciary media *per se*. Accordingly, it is only *after* fully discussing both the advantages and disadvantages of fiduciary media, that Mises, in a section comprising the concluding five pages of the book—which is not referred to by White—addresses the "basic questions of future currency policy."[54] Here, Mises reprints the conclusion of the first German edition (the English edition is a translation of the second German edition published in 1924), in which he emphatically urged the suppression of all further creation of fiduciary media, if not the outright banning of fractional-reserve banking. Contrary to White's assertion, Mises was evidently convinced that the disadvantages of issuing fiduciary media, now including their cycle-generating property, far outweighed their earlier enumerated advantages.

Concludes Mises:

> [Fiduciary media] should logically be subjected to the same principles that have been established with regard to money proper; the same attempts should be made in their case as well to eliminate as far as possible human influence on the exchange ratio between money and other economic goods. The possibility of causing temporary fluctuations in the exchange ratios between goods of higher and of lower orders by the issue of fiduciary media, and the pernicious consequences connected with a divergence between the natural and money rates of interest, are circumstances leading to the same conclusion. Now it is obvious that the only way of eliminating human influence on the credit system is to suppress all further issue of fiduciary media. The basic conception of Peel's Act ought to be restated and more completely implemented than it was in the England of his time by including the issue of credit in the form of bank balances within the legislative prohibition.

[53]Mises's discussion of the advantages of fiduciary media occurs on pages 298–99 and 323, while his business cycle theory is presented on pages 339–66 (Mises, *Theory of Money and Credit*).

[54]Ibid., p. 406.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

> *It would be a mistake to assume that the modern organization of exchange is bound to continue to exist. It carries within itself the germ of its own destruction; the development of fiduciary media must necessarily lead to its breakdown.* . . . It will be a task for the future to erect safeguards against the inflationary misuse of the monetary system by the government and against the extension of the circulation of fiduciary media by the banks.[55]

It is hardly to be concluded from the passage I have emphasized in the foregoing quotation that Mises looked with equanimity, let alone favor, upon the further creation of fiduciary media by banks, whether "free" or not.

White (p. 520) cites a part of a paragraph from a later, 1928 work of Mises's,[56] in which Mises reiterates the point that a suppression of the issue of fiduciary media would have given rise to historical situations in which the emergence of an excess demand for money resulted in an increase in the purchasing power of money that was temporarily disadvantageous to the economy. However, White does not cite the last sentence of this same paragraph, which identifies an important benefit that would have followed from the prohibition of further emission of fiduciary media: "the economy surely would not then have experienced the stormy upswings followed by dramatic reversals of the upswings into crises and declines."[57]

Mises also makes it clear later in the same work that the benefits of fiduciary media fall far short of their costs in terms of cyclical discoordination of economic activity. He therefore calls for the implementation of a revised Currency school program in the following terms:

> The most important prerequisite of any cyclical policy, no matter how modest its goal may be, is to renounce every attempt to reduce the interest rate, by means of banking policy, below the rate which develops on the market. That means a return to the theory of the Currency school, which sought to suppress all future expansion of circulation credit and thus all further creation of fiduciary media. . . . [I]t means the introduction of a new program based on the old Currency school theory, but expanded in the light of the present state of knowledge to include fiduciary media issued in the form of bank deposits.[58]

[55]Ibid., p. 407–09.

[56]The English translation is Ludwig von Mises, "Monetary Stabilization and Cyclical Policy," in idem, *On the Manipulation of Money and Credit*, Bettina Bien Greaves, trans. (Dobbs Ferry, N. Y.: Free Market Books, 1978), p. 145.

[57]Ibid.

[58]Ibid., pp. 167–68.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Far from rejecting the Currency school program, as White would have us believe, it is clear Mises desired to reformulate it on a sounder theoretical basis in order to strengthen its practical application. Thus, contrary to White, Mises supported a free banking regime precisely because it would eventually result in "extreme restraint in the issue of fiduciary media." Free bankers would learn such restraint from their experiences of the crises and bank runs that would inevitably occur during the historical course of development of fiduciary media. Once such lessons were absorbed by the more astute banking entrepreneurs, policies of extreme caution and restraint would be enforced on the entire banking system as less responsible banks persisting in the further creation of fiduciary media would be immediately confronted by the twin threats of adverse interbank clearings and of loss of confidence by a once or twice chastened and now more sophisticated bank clientele.[59] At this point the program of the Currency school would be fully and properly implemented, as further extension of "circulation credit" by the banks would be checked and any additional accumulation of bank assets would reflect an increase in commodity credit based on time deposits and equity investments of voluntarily saved funds.

Unlike our modern free bankers, Mises emphatically did not foresee the free banking system evolving toward a minuscule reserve ratio of gold to demand liabilities and the progressive transformation of gold into a practically demonetized interbank "clearing asset."[60] For Mises, rather, evolution was all in the opposite direction, with initial entrepreneurial ignorance precipitating an early splurge in the creation of fiduciary media and the resulting cyclical fluctuations leading slowly back to a system of marginal 100 percent reserves while painfully renewing awareness among the public that bank notes and deposits are not money *per se* but merely claims to and substitutes for money, i.e., gold.

In his earlier writings, then, Mises did perceive there to be definite advantages associated with the issue of fiduciary media, but

[59]Ibid., pp. 138–40.

[60]Lawrence H. White and George A. Selgin, "The Evolution of a Free Banking System," in Lawrence H. White, *Competition and Currency: Essays on Free Banking and Money* (New York: New York University Press, 1989), p. 235. At least one prominent member of the modern free banking school, Richard H. Timberlake (*Gold, Greenbacks, and the Constitution* [Berryville, Va.: George Edward Durell Foundation, 1991]) has taken the leap and now forthrightly advocates free banking on a nonspecie standard, although White himself continues to firmly insist upon gold as the proper monetary standard for a free banking regime. For a critique of Timberlake's plan, see Murray N. Rothbard, "Aurophobia: or, Free Banking on What Standard?" *Review of Austrian Economics* 6, no. 1 (1992): 97–108.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

he was willing to forego such advantages for the greater advantage of maintaining the integrity of monetary calculation and preventing disruptions of the price-and-interest-rate coordination of the economy. By the time he came to write *Human Action*, however, his views on entrepreneurship, monetary calculation, and money had evolved to the point where he was able to recognize that the benefits he had once attributed to the creation of fiduciary media were largely illusory. In particular, the later Mises abandoned his earlier belief that an increase in the purchasing power of money is somehow disadvantageous for the market economy.

Regarding a world in which there occurs a persistent "goods-induced" rise in the purchasing power of money resulting from secular growth in the supplies of commodities and services in conjunction with a rigidly fixed nominal money supply, Mises argued in *Human Action* that such a state of affairs would not disrupt the moment-to-moment price coordinating function of the market or upset the monetary calculations that lead entrepreneurs to efficiently allocate productive resources in service of anticipated consumer preferences.

As Mises wrote:

> Entrepreneurs and investors . . . do not heed the general movement of all prices. What matters for them is the existence of discrepancies between the prices of the complementary factors of production and the anticipated prices of the product. No businessman embarks upon a definite production project because he believes that *the prices*, i.e., the prices of all goods and services, will rise. He engages himself if he believes that he can profit from a difference between the prices of goods of various orders. In a world with a secular tendency toward falling prices, such opportunities for earning profits will appear in the same way in which they appear in a world with a secular trend toward rising prices. . . .
>
> A secular tendency toward a rise in the monetary unit's purchasing power . . . would certainly not influence substantially the course of economic affairs. It would not remove the urge of people to improve their material well being as far as possible by an appropriate arrangement of production. It would not deprive the economic system of the factors making for material improvement, namely, the striving of enterprising promoters after profit and the readiness of the public to buy those commodities which are apt to provide them the greatest satisfaction at the lowest costs.[61]

[61]Mises, *Human Action*, pp. 469–70.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Nor does the later Mises share with Hayek and the free bankers a dread of "monetary demand shocks," i.e., a "money-induced" increase in the purchasing power of money caused by a shrinkage of the money-spending stream due to hoarding. In particular, Mises denies that an increase in the demand for money at the expense of spending on consumer goods while the money supply remains unchanged will impede the process of transforming the additional real savings thus generated into an accumulation of new capital goods. Monetary calculation, taking into account the relative decline in prices of lower-order and consumer products and of the nonspecific factors of production, will faithfully reflect the increase in the availability of capital goods, and the prospect of higher profits will induce entrepreneurs to employ them in the expansion of their operations. As Mises concludes, "the main thing is that the capital goods resulting from additional savings are not destroyed by coincident monetary changes. . . . Whenever an individual devotes a sum of money to saving instead of spending it for consumption, the process of saving agrees perfectly with the process of capital accumulation and investment. It does not matter whether the individual saver does or does not increase his cash holding."[62] For the Misesian, then, the coordinative and calculative market process can and will respond with perfect (*ex ante*) efficiency to any combination of anticipated changes in the set of consumer preferences, including changes in "liquidity" preferences.[63]

This leaves us, finally, only with the advantage of fiduciary media in reducing the cost of supplying a medium of exchange. Although, as White notes, Mises was inclined to heavily weight this alleged advantage in his earlier writings, in *Human Action*, Mises does not allude to it; however, he does refer to "the expensiveness of gold production" as "the minor evil" when compared to the inflationary potential of paper fiat and credit money.[64]

Of course, in *Human Action*, Mises still adhered to his previous view concerning the overwhelming disadvantage of the creation of fiduciary media associated with its potential for falsifying interest rates and monetary calculation, introducing inefficiency into the

[62]Ibid., pp. 521–22.

[63]For a demonstration of this, see Salerno, "Commentary: The Concept of Coordination in Austrian Macroeconomics," pp. 335–40.

[64]Mises, *Human Action*, p. 422. In fact, when free banks invoke option clauses, post-dated notes, and other devices permitting the contractual suspension of specie payments, their notes and deposits are effectively transformed into a credit money, whose value is determined independently of the value of the original money commodity. For a discussion of Mises's neglected concept of credit money that touches upon this point, see Salerno, "Mises's Monetary Theory," pp. 8–11.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

intertemporal allocation of resources, and precipitating the business cycle. This later assessment of the massive imbalance in favor of the disadvantages of fiduciary media may finally have led Mises to overcome his earlier fears of the expansion of political interference with banking that he foresaw as a possible ramification of the ultra-hardcore neo-Currency school program legally debarring all further additions to the outstanding circulation of fiduciary media, including demand deposits as well as notes. Thus, in his 1952 essay on "Monetary Reconstruction," which was included as Part Four in the second English edition of *Theory of Money and Credit*, Mises proposed just such a program as the basis for "the United States return to a sound currency."[65]

I conclude, then, that White's attempt to portray Mises's views on fractional reserves and free banking as prototypical of the modern free banking school, whose members draw their analytical orientation from equilibrium-based Hayekian monetary theory, is untenable. To the extent that Mises advocated the freedom of banks to issue fiduciary media, he did so only because his analysis led him to the conclusion that this policy would result in a money supply strictly regulated according to the Currency principle. Mises's desideratum was not a neutral money, or even a practical approximation thereof, but to completely eliminate the distortive influences of fiduciary media on monetary calculation and the dynamic market process.

As I indicated at the outset, my purpose in writing this review essay has been specifically to illustrate and rebut the common tendency that I believe exists among fellow Austrian economists to conflate the views of Mises and Hayek. Rigid adherence to this purpose has caused the tone of the review to be decidedly negative. However, this should not be construed to mean that I disagree with all or even most of each of the essays under review. Had I reviewed these papers with a broader purpose in mind, the extent of the common ground between myself and the papers' authors, based on the "Mengerian overlap" between the Misesian and Hayekian paradigms, would have been quite evident. Moreover, I regard the contributions by Kirzner and White to this volume to be, each in its own respect, excellent summaries of these authors' pioneering efforts elsewhere to systematize and extend the Hayekian paradigm. In the case of Kirzner, it can be argued that his formidable body of work

[65]Mises, *Theory of Money and Credit*, pp. 448–52.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

largely defines this paradigm as it currently stands. And the endeavor by White and the modern free banking school to give this paradigm a contemporary macroeconomic expression rests on the Kirznerian conception of the market process. Ikeda's essay, his attributions to Mises notwithstanding, is a promising initial step in the direction of adumbrating a Hayekian theory of interventionism, and Ebeling's essay, for the most part, does capture the uniqueness and fruitfulness of the Misesian approach to the demand for money. Having said this, I still insist that the homogenization of the views of two brilliant but very different thinkers serves no purpose today but to significantly impede the quest for knowledge and truth among those working within the Mengerian tradition.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Book Reviews

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Capitalism and Individualism. By Tibor Machan. New York: St. Martin's Press, 1990.

Tibor Machan is not the philosopher than whom no more productive can be conceived—that distinction belongs to Nicholas Rescher. But no other philosopher rivals Machan in his relentless stream of books, articles, and—not to be forgotten—letters to the editor in defense of a free society. *Capitalism and Individualism* ranks as one of Machan's best works. Its thesis deserves to arouse wide discussion among economists.

Although most American economists look favorably on the free market, Machan finds their characteristic defense of it lacking. As he sees it, economists uncritically assume that morality is not objective. Values consist entirely of subjective preferences, no more and no less.

This position appears to place its advocates in a difficult position. If they wish to support a particular social policy, are they not merely expressing their preferences? Why should others listen? Economists such as Milton Friedman and James Buchanan who favor moral subjectivism claim that they nevertheless can adequately defend the free market.

They assume that most people want material wealth. Given this goal, the economists can prescribe the method that offers the best chance toward its attainment. But goals are not confined to material wealth, important as this ranks. People wish to realize their preferences, whatever they may be, and the free market enables them to do so better than any alternative system. Every trade makes people better off from their own point of view.

Machan finds this approach "weighed, and found wanting in the balance." It rests, he thinks, on reductivist materialism and denies free will. Besides depending on these dubious philosophical underpinnings, the view fails on its own terms. People are not always better off when they make an exchange: is a drug addict better off when he

The Review of Austrian Economics Vol.6, No. 2 (1993): 149–51
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

buys narcotics (p. 10)? Further, many people do not rank material wealth first above all else. If the "neo-Hobbesians" then shift to the claim that people in the free market select their highest valued preference, whatever it is, they have arrived at a tautology. Finally, the economists' defense of the market does not inspire people. Even so wrong-headed a philosophy as Marxism does better on this score.

What is one to think of Machan's provocative diagnosis? Machan seems to me entirely on target in challenging the uncritical assumption among many economists that value subjectivism is correct. I am less sure of his amalgamation of this view with materialism and determinism. Value subjectivism, so far as I can see, implies neither of these doctrines. James Buchanan, one of Machan's prime targets, advocates free will; and Ludwig von Mises, who to some extent fits Machan's model so far as value is concerned, supported dualism and free will as methodological assumptions. Nevertheless, I think Machan is right to assume some affinity between the various strands of the "neo-Hobbesian" account. The nature of the connection, if indeed it exists, needs to be spelled out.

Machan argues that those who say that we always choose our most highly valued preference have fallen into tautology. This seems to me mistaken. "Most highly valued preference" is not, after all, defined as "whatever we in fact choose," and some people, e.g., the proponents of satisficing rationality, deny that the statement is true. As they see it, we need only choose what is good enough: we need not select our highest ranked choice. Whether they are right is another question, but surely their contention is not self-contradictory. How then can the principle that we always choose our highest-ranking preference be empty of content?

Fortunately, this point does not much affect Machan's argument. Together with his criticism of the economists, he offers a proposal of his own. Defense of the market should rest on an explicit philosophy. It will come as no surprise that the philosophy Machan supports takes its chief inspiration from Ayn Rand.

Values in this system are objective, though not intrinsic. The world consists of multiple layers of being; he rejects mechanistic materialism in favor of a philosophy of emergence. Machan argues strongly for free will, citing the work of R.W. Sperry in its defense.

If people have freedom of choice, they bear responsibility for their actions. They are not passive products of changing circumstances. To meet their responsibilities, the cultivation of virtue is essential, and this vital task demands freedom for its realization. Attempts to impose virtue on others neglect this crucial condition. Here in essence

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

is Machan's argument for freedom: it rests on the requirements of virtue rather than the vagaries of skepticism.

Machan's case for freedom does not reject economic efficiency. Rather, he maintains that arguments based on economics require philosophical support. He contends that without such support, the calculation argument of Mises and Hayek achieves little. True enough, only a market economy can produce a wide variety of consumer goods efficiently. But what if the government does not care about this? It may demand that consumer tastes be sacrificed (pp. 120–21).

Machan quite correctly notes that not all regimes aim at consumer welfare. But the calculation argument does not assume the contrary. It applies as much to a dictatorship that wants tanks as it does to consumers who demand video games. The nub of the argument is that only a market can efficiently operate a structure of production. It deals with "higher order" goods rather than consumption.

If Mises is right, the efficiency argument case for the market has more strength than Machan allows. So long as the goals of people living in a modern society do not require economic chaos, their establishment of a socialist economy is irrational. If this is regarded as an argument against socialism, certain value judgments are assumed; but they hardly seem controversial. To make an economic case for the market, one need not put material wealth first. To accord it some weight suffices. (I have placed to one side the case of socialist regimes that can use the prices of capitalist economies.)

Several other remarks in the book seem dubious. Arrow's Theorem does not merely contend that intransitive preferences are possible: it sets forward certain conditions that *cannot* be mutually fulfilled (p. 126). Thomas Sowell's *Marxism* is not, except for its final chapter, anti-Marxist; Sowell defends Marx against Böhm-Bawerk's criticism (p. 10). Thomas Nagel does not contend prudence is irrelevant to morality. The principal argument of *The Possibility of Altruism* is that if prudence is rational, so is morality.

Although Machan sometimes errs in detail, his main contention in *Capitalism and Individualism* strikes home. Economists who reject moral objectivity need to examine their premises. Machan's hard-hitting book is a good place to begin.

David Gordon
Ludwig von Mises Institute

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Swimming Against the Tide in Contemporary Philosophy. By Henry B. Veatch. Washington, D.C.: Catholic University of America Press, 1990.

In the past several years a number of economists centered at George Mason University have claimed to find an affinity between Austrian economics and certain types of Continental philosophy. Their views have not gone uncontested: Murray Rothbard and Hans Hoppe have assailed the "hermeneuticists" with characteristic vigor. I fear I am no unbiased witness, as I have played a minor part in the controversy.

Henry Veatch, a distinguished Aristotelian philosopher, advances in this excellent book an interpretation of modern philosophy which illuminates the controversy over hermeneutics. In addition, he presents a carefully conceived defense of Aristotelian ethics. Economists interested in welfare economics will find Veatch's discussion of ethics of substantial albeit indirect help to them. Often welfare economics conceals utilitarian premises, and Veatch subjects this ethical system to penetrating scrutiny. Although the book is a collection of separate essays, it is remarkably unified.

Like his master Aristotle, Veatch proceeds by a dialectical method. He means by this an analysis of the insights and errors of non-Aristotelian philosophers in order to "remove the obstacles" to what he deems the correct position (p. 6). It soon transpires that the rival philosophies contain much more error than insight.

Since Descartes, modern philosophy has refused to use as its starting point commonsense knowledge of the world. Descartes's methodic doubt changed the criterion of truth and had the effect of "transforming the everyday world . . . into a world that is largely unrecognizable by the commonsense and common experience of mankind" (p. 38).

The Review of Austrian Economics Vol.6, No. 2 (1993): 153–58
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Descartes and his rationalist successors failed in their quest to prove the existence of the external world and discover its nature through the use of deduction. Their empiricist counterparts were equally unable to show how one can gain knowledge of the real world if one is restricted solely to ideas or sensations.

Philosophy faced an impasse. Immanuel Kant claimed to have found an escape that would end the stagnation of philosophy and permit it to progress as a science. Veatch believes that the transcendental turn, as he calls Kant's proposal, was a disastrous mistake. Nevertheless, it has dominated subsequent philosophy.

In brief, Kant thought that we cannot know things as they are in themselves. Instead, the mind imposes a grid consisting of the categories and the intuitions of space and time upon reality. Although we cannot know the real world, we can know appearances, since our minds have created them.

Veatch finds in this turn to the subject the basis of relativism and irrationalism. Kant thought that everyone used the same categories. He claimed to derive them by a "transcendental deduction"; if he was right, people have no choice in their application of concepts to experience.

Kant's successors made the categories changeable and relative. This more radical form of the transcendental turn has an unbreakable hold on modern philosophy. Veatch uses the turn to explain Quine's philosophy and, more generally, contemporary philosophy of science. A "theory or hypothesis in science is accepted, ultimately, for scarcely any other reason than that it enables us to introduce at least some sort of order and intelligibility into what otherwise would be a sheer welter of experience" (p. 53).

The culmination of the turn lies in the utter irrationalism of the Deconstructionists. He sees this movement not as a mere Continental fad. It carries to an extreme tendencies present in modern philosophy from its inception. Deconstruction totally rejects external control over textual interpretation. The transcendental turn can at last go no farther.

Veatch argues that this movement has malign ethical consequences. Both Deconstruction and the pragmatism of Richard Rorty lead to "that total permissiveness that Nietzsche talked about so confidently and so brashly" (p. 92; question mark omitted).

Veatch's probing account of modern philosophy will seem familiar to readers influenced by Ayn Rand, who gives a similar account of the errors of modern thought. Although so far as I am aware the two did not know or influence each other, a number of Randian philosophers esteem Veatch highly.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Though Veatch's analysis is impressive in its scope and unity, a few doubts—not I hasten to add, Cartesian ones—come to mind. First, one gets the impression from Veatch's discussion that Descartes arbitrarily rejected commonsense beliefs. But would not Descartes respond that the skeptical issue he addressed is a genuine problem? How do we know that our experience gives us knowledge of the real world? Veatch I think would reply that all attempts to justify knowledge which start from doubt of commonsense have failed. Either we take as given that we perceive real things or we wind up in skepticism. *Tertium non datur.*

The effectiveness of this response depends on Veatch's success in showing that once skepticism is allowed in the door, it cannot be expelled. His criticism of Kant's transcendental turn is especially vital, since he sees the turn as basic to contemporary philosophy.

Veatch's evaluation of Kant, however, strikes me as disputable. He takes Kant to be saying, in effect: "We do not know reality: all that we know are appearances." Veatch rightly takes this view to lead to relativism and skepticism.

But this interpretation of Kant depends crucially on the equation of reality with things-in-themselves. Since the phenomenal world includes everything governed by the categories, it might be argued that the phenomenal world just *is* the commonsense world. If so, Kant did not then deny realism but affirmed it. I do not mean to endorse this view of Kant: there is a great deal to be said for Veatch's interpretation. But if the realistic view of Kant is right, Veatch needs to show that Kant's deduction of the categories fails. Otherwise, his indictment of the transcendental turn collapses.

In "Is Quine a Metaphysician?", Veatch attempts to use one of Quine's own arguments against him. The theme of the piece is that Quine has made Kant's transcendental turn. He imagines a Quinean objector who protests against his translation of "Quinese" into "Kantese" on the grounds of the radical indeterminacy of translation, a famous thesis of Quine's. Veatch replies by citing another Quinean view, the inscrutability of reference.

Veatch has misread the passage he quotes from *Ontological Relativity*. He thinks Quine claims that because "it makes sense to say even of oneself that one is referring to rabbits and formulas and not to rabbit stages and Gödel numbers, then it should make sense to say it of someone else" (p. 79, citing Quine, *Ontological Relativity*). But Quine's point is just the opposite. He thinks that because it does *not* make sense to say of someone else what he refers to, it does not make sense for someone to say it of himself.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

Veatch also finds contemporary moral philosophy radically unsatisfactory. He draws the customary distinction between teleological and deontological theories. The latter fail utterly; the former require revision along Aristotelian lines.

Veatch approaches ethics with a fundamental assumption. No ethical judgments are self-evident. Claims that people have rights or obligations require justification: they cannot be simply taken as obvious. I wonder whether this is correct. Are there no particular judgments, e.g., "Torturing small children for fun is wrong" that are more clearly true than the premises of any theory supposed to justify them? Veatch is no doubt right that the judgment just given is not self-evident, if by that he means that no logical contradiction results from the statement's negation.

But self-evidence in this sense, and "obvious" truth, are two quite different things. Veatch moves too quickly from one to the other. If we can take our ordinary commonsense judgments to be true in epistemology, why may we not do the same in ethics?

But even if Veatch has insufficiently justified the need for justification, he raises penetrating objections to the particular theories he discusses. Utilitarianism fails because of a flaw in its starting point. Its advocates tell us to maximize happiness, understanding happiness as the satisfaction of desire. But why is it good to satisfy desire? Unless a utilitarian can first establish this, he cannot arrive at an ethic. Appeal to the Principle of Universalizability avails nothing. If someone argues "I want to satisfy my desire; but if it is good to satisfy my desire, it is good to satisfy anyone else's," he has begged the question. *Is* it good to satisfy desire?

Deontological theories fare no better. "[T]here is no basis whatever for the rights claims that are the very basis and starting point of modern teleological ethics" (p. 111). Kant's categorical imperative lends no help, because it is a purely formal principle. Gewirth's principle of generic consistency suffers from a failing like that of utilitarianism. Even if Gewirth is right that the nature of action compels us to claim certain rights, we cannot generate an ethics by universalizing the claims. The rightness of the original claims has not been shown: without an "ought" from which to begin, nothing is available to universalize.

Some theories are in even worse shape, since their advocates advance no arguments at all in their defense. He includes Robert Nozick among this group.

What then is the answer? Veatch locates it in "obligatory ends" (p. 101). These are desires that an individual ought to have. They qualify as ethical by passing the "Euthyphro test": one desires

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

them because they are good. They are not good because they are desired.

Now the question of course becomes: how are obligatory ends established? Veatch once more returns to Aristotle. Human beings have a nature, and what perfects that nature is an obligatory end. Once one obtains, "I ought to perfect my nature," the Principle of Universalizability does the rest. Everyone ought to perfect his or her nature. Thus ethics has been established on a rational basis.

Veatch's relentlessly pressed case arouses both admiration and doubt. As with epistemology, the form of his argument is this: approaches *A*, *B*, — etc. will not work. If, then, we want an objective ethics we must proceed in the way Veatch specifies.

But to argue that unless one adopts his view, one will end up on an unwanted position begs the question. If one accepts Veatch's contention that ethical judgments are not self-evident, why take for granted that an objective ethics can be derived?

Veatch might deny that he has argued solely by elimination of alternatives. On the contrary, he has argued directly for the truth of his view. But the system of natural ends he favors depends on a controversial principle: a human being ought to fulfill his natural end. Though I cannot now argue the point, I think the principle requires more defense than Veatch gives it here or in his earlier books.

Veatch also is open to objection for not being Aristotelian enough. Why does he combine his natural-end ethics with the Principle of Universalizability, a Kantian device? It is not obvious that a moral system must use this principle, nor is it a truth of logic. Veatch recognizes that some libertarians have challenged the principle, but he discusses only those who abandon morality altogether along with universalizability. He never considers genuine moralities lacking this feature (pp. 183, 186–87).

With characteristic independence of mind, Veatch maintains that all rights are negative. There is "no warrant for supposing that as human beings we have any positive rights at all" (p. 326). This is well said, but, unfortunately, Veatch's argument for negative rights fails. He then is left with no justified rights at all.

His defense of rights is that if "I ought to do something then I have a right not to be interfered with" (p. 325). How can this be justified on Veatch's own ethics? He argues that each person ought to pursue his natural end. But nothing in this principle forbids someone from interfering with someone else's pursuit of his end.

The principle also fails without reference to Veatch's ethics. Suppose one has a duty to make the best use of his talents. Someone

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

correctly decides that obtaining a job as a bouncer at the W. D. Ross Bar will be a major step forward. Does this prevent others from competing for the job?

He makes one or two other dubious claims about moral theory. He argues that amoralism is self-referentially inconsistent if the amoralist tries to give reasons for his refusal to pay attention to morality. If the amoralist says he ignores morality because there is no such thing, is he not claiming justification for his conduct (p. 189)?

He is indeed, but he need not claim moral justification. To assume that justification must be moral begs the question. The amoralist can view his ignoring morality as analogous to the denial unicorns exist. He is an amoralist, not an arationalist.

Also, Veatch's account of Philippa Foot is inaccurate. She claims that certain terms, e.g., "courageous" or "rude," can be applied only in particular circumstances. Avoiding the cracks in the sidewalk while walking could not be courageous, if this is all there is to the story. Veatch agrees with her but thinks her argument rests on "mere linguistic rules" instead of a genuine connection with reality (p. 147). This imputes to her a conventionalist view of language she takes pains to argue against. Also, he wrongly supposes that she accepts universalizability.

As will be apparent, I do not invariably agree with Professor Veatch. But he is sometimes profound, usually first-rate, and always provocative.

David Gordon
Ludwig von Mises Institute

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

THE REVIEW OF AUSTRIAN ECONOMICS

- **Volume 1**: Leland Yeager on subjectivism; Henry Hazlitt on inflation; Lowell Gallaway and Richard Vedder on prices and employment; Richard Timberlake on utility in monetary theory; Murray Rothbard on Schumpeter and Walrasian economics; William Keizer on Mises and socialist calculation; E. C. Pasour on rent seeking; Gene Smiley on Keynesian fiscal policy; Robert Batemarco on GNP. (1987) Hardbound: $30.00 *B168*

- **Volume 2**: Israel Kirzner on economic calculation; George Selgin on praxeology; Thomas DiLorenzo on competition and political entrepreneurship; Gordon Tullock on depressions; David Osterfeld on transfers of wealth; Jeffrey Herbener on Austrian methodology; Joseph Salerno on influence of French liberal traditions in economics; Arthur Diamond on Austrianism in late Hapsburg Vienna. (1988) Hardbound: $40.00 *B167*

- **Volume 3**: Morgan Reynolds on W. H. Hutt; Roger Garrison on business cycles; Samuel Cameron on the economics of crime; Murray Rothbard on hermeneutics; Dominick Armentano on antitrust reform; Mark Skousen on depressions; E. C. Pasour on efficient-markets hypothesis; W. H. Hutt on trade unions. (1989) Hardbound: $38.00 *B166*

- **Volume 4**: Ralph Raico on German classical liberalism; Joseph Salerno on Mises as social rationalist; Hans Hoppe on banking and nation states; Jeffrey Rodgers Hummel on national goods versus public goods; Murray Rothbard on Karl Marx as religious eschatologist; Thomas DiLorenzo on James Buchanan's subjectivist roots.

For more information about previous volumes of
the *Review of Austrian Economics* write to:

Ludwig von Mises Institute
Auburn University
Auburn, Alabama 36849-5301
(205) 844-2500; fax (205) 844-2583.

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

New from Kluwer!

The Economics and Ethics of Private Property

Studies in Political Economy and Philosophy

by **Hans-Herman Hoppe,** *University of Nevada, Las Vegas*

1993 ISBN 0-7923-9238-7

Cloth 288 pages $59.95/Dfl.125.00/£44.25

The Economics and Ethics and Private Property considers in depth the basic economic and philosophical issues surrounding the concept of private property. The author adheres to the Austrian school of economic thought in pursuing this analysis and comes to the conclusion that the right to private property is a principle of ethics and the "basis for continual 'optimal' economic progress."

Contents: PART I: ECONOMICS • Fallacies of the Public Goods Theory and the Production of Security • The Economics and Sociology of Taxation • Money, Banking and International Politics. A Sociological Reconstruction of the Present Economic Order • Marxist and Austrian Class Analysis • The Theory of Employment, Money, Interest, and the Capitalist Process. The Misesian Case Against Keynes • **PART II: PHILOSOPHY** • On Praxeology and the Praxeological Foundation of Epistemology • Is Research Based on Causal Scientific Principles Possible in the Social Sciences? • From the Economics of Laissez Faire to the Ethics of Libertarianism • The Justice of Economic Efficiency • On the Ultimate Justification of the Ethics of Private Property • Austrian Rationalism in the Age of the Decline of Positivism • Appendix: Four Critical Replies • References • Index

to order, or for more information, contact:

Kluwer Academic Publishers

Order Department, Box 358, Accord Station, Hingham, MA 02018-0358 • phone (617) 871-6600 • fax (617) 871-6528 • e-mail: kluwer@world.std.com

P.O. Box 322, 3300 AH Dordrecht, The Netherlands • phone (31) 78 524400 • fax (31) 78 183273 • telex: 20083 kadc nl

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED

0889-3047(199307)6:2;1-0

The Review of Austrian Economics Volume 6, No. 2
ISSN 0889-3047

LICENSED TO UNZ.ORG
ELECTRONIC REPRODUCTION PROHIBITED